Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

ABRAHAM NEIMAN CEMAJ and
INTERNATIONAL BANK OF COMMERCE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition for Writ of Certiorari concerns the judicial enforcement of an administrative summons issued by the Internal Revenue Service at the behest of the Mexican government, seeking production from International Bank of Commerce in Laredo, Texas of all the records pertaining to a bank account of Abraham Neiman Cemaj, a Mexican citizen. This Petition presents the following questions:

(1) Whether hearsay-based testimony by IRS agents with no personal knowledge concerning a purported foreign tax investigation is sufficient to satisfy the government's burden to justify enforcement of a civil administrative tax summons in accordance with *United States v. Powell*, 379 U.S. 48 (1964);

2) If so, whether affording lesser protection to a foreign citizen than is required in a case involving a United States taxpayer is consistent with the United States Constitution, applicable rules of procedure and evidence, and international law;

(3) Whether the trial court abused its discretion in failing to give Petitioners a fair opportunity to investigate the legitimacy of the foreign summons request or to cross-examine witnesses with personal knowledge concerning the purported foreign tax investigation; and

(4) Whether Congress authorized the IRS to enter into tax information exchange agreements with Mexico and any other "foreign country," despite the fact that only expressly identified countries, not including Mexico, may be parties to such agreements. 26 U.S.C. §§ 274(h)(6)(B), 927(e)(3); 19 U.S.C. § 2702(b).

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Abraham Neiman Cemaj, a Mexican citizen, and the International Bank of Commerce* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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* International Bank of Commerce is a Texas state banking association and wholly-owned subsidiary of International Bancshares, Inc. International Bank of Commerce-Laredo and International Bank of Commerce-Zapata are separately-chartered subsidiaries of International Bancshares, Inc.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is unpublished (App. B, 3a). The opinion of the United States District Court for the Western District of Texas, Laredo Division, which was affirmed by the court of appeals, is also unpublished (App. D, 6a).

STATEMENT OF JURISDICTION

The district court granted the United States' motion to enforce an administrative summons issued by the Internal Revenue Service on May 31, 1994, and entered final judgment against Petitioners on June 20, 1994. The court of appeals affirmed the trial court's order on March 28, 1995 and overruled Petitioners' petition for rehearing on May 12, 1995. This Court has jurisdiction over this case pursuant to 28 U.S.C.A. § 1254 (West 1993) and 26 U.S.C.A. § 7609(h)(1) (West 1989).

CONSTITUTIONAL PROVISIONS, TREATIES AND INTERNATIONAL AGREEMENTS, AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the Constitution of the United States provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

The IRS issued and is seeking to enforce the administrative summons at the behest of the government of Mexico pursuant to article 4 of a purported tax information exchange agreement with that country entitled *Agreement Between the United States of America and United Mexican States for the Exchange of Information With Respect to Taxes* ("Mexican TIEA"), which provides in pertinent part:

> **Article 4**
>
> **EXCHANGE OF INFORMATION**
>
> 1. The competent authorities of the Contracting States shall exchange information to administer and enforce the domestic laws of the Contracting States concerning taxes covered by this Agreement, including information to effect the determination, assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes or crimes involving the contravention of tax administration.
>
> * * *
>
> 4. The competent authority of the requested State shall provide information upon request by the competent authority of the applicant State for the purposes referred to in paragraph 1. If the information available in the tax files of the requested State is not sufficient to enable compliance with the request, that State shall take all relevant measures to provide the applicant State with the information requested.

> a) The requested State shall have or has the authority to . . . (iii) compel any person having knowledge or in possession, custody, or control of information which may be relevant or material to such inquiry . . . .
>
> * * *
>
> c) Privileges under the laws or practices of the applicant State shall not apply in the requested State in the execution of a request. Claims of privilege under the laws or practices of the applicant State shall be determined exclusively by the courts of that State, and claims of privilege under the laws or practices of the requested State shall be determined exclusively by the courts of that State.
>
> 5. If information is requested by a Contracting State pursuant to paragraph 4, the requested State shall obtain the information requested in the same manner, and provide it in the same form, as if the tax of the applicant State were the tax of the requested State and were being imposed by the requested State . . . .
>
> 6. The provisions of the preceding paragraphs shall be construed so as to impose on a Contracting State the obligation to use all legal means and its best efforts to execute a request. . . .

A complete copy of the Mexican TIEA is included as Appendix H, 29a.

Article 5 of the *Convention Between the United States of America and Other American Republics Regarding the Status of Aliens*, June 6, 1930, 46 Stat. 2753, provides:

Article 5

> States should extend to foreigners, domiciled or in transit through their territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties.

A complete copy of the Convention is included as Appendix I, 42a.

Section 7602 of the United States Internal Revenue Code, 26 U.S.C., provides in pertinent part:

> **Examination of books and witnesses**
>
> **(a) Authority to summon, etc.** — For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting such liability, the Secretary [of the Treasury] is authorized —
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7604(a) of the Internal Revenue Code provides:

> **(a) Jurisdiction of district court.** — If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

Section 7605(b) of the Internal Revenue Code provides in

pertinent part that: "No taxpayer shall be subjected to unnecessary examination or investigations. . . ."

Section 7609(b) of the Internal Revenue Code provides in pertinent part:

> **(1) Intervention.** — Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.
>
> **(2) Proceeding to Quash — (A) In general** — Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). . . .

Section 7605(h)(1) of the Internal Revenue Code provides in pertinent part:

> **Jurisdiction.** — The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2). . . . An order denying the petition shall be deemed a final order which may be appealed.

Section 7605(i)(1) of the Internal Revenue Code provides:

> **Recordkeeper must assemble records and be prepared to produce records.** — On receipt of a summons described in subsection (c), the third-party recordkeeper shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

STATEMENT OF THE CASE

In *United States v. Powell*, 379 U.S. 48 (1964), this Court established the minimum standards for judicial enforcement of administrative summonses. In order to justify enforcement of a summons by a district court, the government must, among other things, prove that the summons was issued in good faith pursuant to a legitimate civil tax investigation.

This case involves a collision between the long-established *Powell* standards and a relatively new phenomenon: tax information exchange agreements that require the IRS to issue administrative subpoenas at the behest of a foreign government in connection with a foreign tax investigation. In this case, the IRS, acting in effect as an investigatory arm of the Mexican government, seeks to seize the bank account records of a Mexican citizen from a United States bank.

The issue raised by this collision is to what extent *Powell* protects a foreign taxpayer who maintains records in the United States. More specifically, in the case of a foreign-request summons, must the IRS satisfy the *Powell* standards with competent evidence, or is it sufficient that IRS agents with no personal knowledge about the purported tax investigation testify

that they believe what they were told by a foreign official? And is the foreign taxpayer entitled to a meaningful opportunity to discover the facts that allegedly support the summons request? Petitioners ask this Court to hold that *Powell* fully protects a foreign citizen targeted by a foreign-request IRS summons.

A. Issuance of the Summons

On September 20, 1991, at the request of the Mexican government, the IRS issued an administrative summons to the International Bank of Commerce in Laredo, Texas, ordering the Bank to produce all of the account records of Abraham Neiman Cemaj, a Mexican citizen, for the period January 1, 1988 through February 13, 1991. App. F, Exh. 1, 23a. Cemaj is a co-trustee of the account. The IRS issued the summons pursuant to article 4 of a "tax information exchange agreement" entitled *Agreement Between the United States of America and United Mexican States for the Exchange of Information With Respect to Taxes* ("Mexican TIEA"). App. H, 29a.

B. Summons Contested in District Court

Cemaj filed a petition to quash the summons, challenging its validity. The Bank subsequently intervened as a "third-party recordkeeper" to oppose the summons. The IRS, in turn, counterclaimed for judicial enforcement of the summons.

The IRS filed a motion for summary enforcement of the summons, along with declarations of an IRS agent, Carlos A. Brosig, and an assistant IRS commissioner, Regina M. Deanehan. Apps. E-F, 17a-20a. Deanehan, as the designated "competent authority" under the Mexican TIEA, recited that the Mexican government had "reason to believe that Abraham Neiman Cemaj may have failed to report all of his income during the periods covered by the summons." The affidavit also stated that Deanehan was "satisfied" that the Mexican taxing authority did

not already have the requested information, that the information might be relevant to Cemaj's tax liability under Mexican law, and that the Mexican taxing authority could obtain the information under Mexican law. The affidavit did not purport to establish that Deanehan had personal knowledge of any of these matters, and it is undisputed that she did not.

Brosig's affidavit described service and notice of the summons, and recited that "to the best of [his] knowledge" there was no ongoing civil or criminal investigation of Cemaj by the IRS. Again, it is undisputed that Brosig had no personal knowledge concerning the alleged Mexican tax investigation.

Petitioners filed controverting affidavits and a response to the government's motion. In his affidavit, Cemaj testified that, based on his personal knowledge, the Mexican government's request for issuance of the summons was "motivated by a personal vendetta against [him] for the purpose of harassing [him] and has been motivated by [his] business competitors and is not for a legitimate tax investigation." App. G, 27a. In addition to asking for denial of enforcement of the summons, Petitioners asked in the alternative for the opportunity to engage in limited discovery for the purpose of determining whether the summons was proper under *Powell* and for an order requiring the IRS to produce for in camera inspection the Mexican government's written request for the issuance of the summons. The response also specifically objected to the various unsupported, conclusory, and hearsay statements in the affidavits of Deanehan and Brosig.

C. The Trial Court Orders the Summons Enforced, But Stays the Order Pending Appeal

On May 31, 1994, the trial court granted summary enforcement of the IRS summons and denied the relief sought by Petitioners. App. D, 6a. The court entered final judgment on June

27, 1994. App. C, 5a. Petitioners timely filed their notice of appeal to the Fifth Circuit Court of Appeals on August 19, 1994, and asked the trial court to stay execution of the judgment pending appeal pursuant to Fed. R. Civ. P. 62(d). After hearing, the trial court ordered its judgment stayed in order to preserve Petitioners' rights to seek review.

D. The Court of Appeals Affirms the Enforcement Order

Without hearing oral argument, the court of appeals affirmed the trial court's judgment enforcing the summons in a short, unpublished order. App. B, 3a. The panel based its summary affirmance on *Barquero v. United States*, 18 F.3d 1311 (5th Cir. 1994). Petitioners timely filed their motion for rehearing on March 12, 1995, which the court of appeals denied on May 12, 1995. App. A, 1a.

E. Petitioners Seek Stay of Enforcement Pending Petition for Writ of Certiorari

Following the court of appeals' denial of their petition for rehearing, Petitioners filed a motion to stay the issuance of mandate pending the filing of their petition for certiorari to this Court. Fed. R. App. P. 41. The court of appeals denied the motion on June 7, 1995, and the clerk issued the court's mandate the following day. The United States promptly filed a motion with the district court seeking enforcement of the summons within 3 days. Petitioners then filed with the court of appeals a motion for rehearing of the denial of stay and a motion for recall of the court's mandate and filed a motion with the trial court to continue its previously-ordered stay of enforcement. On June 23, 1995, Petitioners also filed a motion with Circuit Justice Antonin Scalia for an emergency stay of enforcement of the judgment. Sup. Ct. R. 23. The court of appeals denied the motions for rehearing and to recall mandate on July 10, 1995. On July 12, 1995, Justice

Scalia denied the emergency motion for stay, which was not yet ripe due to the pendency of the motions in the trial court. The United States' motion to enforce the judgment and Petitioners' motion to continue the trial court's stay are set for hearing before the district court on August 25, 1995.

REASONS FOR GRANTING THE WRIT

I.

JUDICIAL ENFORCEMENT OF AN IRS ADMINISTRATIVE SUMMONS WITHOUT COMPETENT PROOF THAT THE SUMMONS WAS ISSUED IN GOOD FAITH IN CONNECTION WITH A LEGITIMATE CIVIL TAX INVESTIGATION BREACHES THE MINIMUM PROTECTIVE STANDARDS AGAINST ABUSE OF GOVERNMENTAL POWER ERECTED BY THIS COURT IN *UNITED STATES V. POWELL*, 379 U.S. 48 (1964).

A. *Powell* Guarantees a Minimum Level of Protection Against Abuse of Administrative Summons Power.

Section 7602 of the Internal Revenue Code authorizes the IRS to issue a summons for documents in order to investigate the correctness of a return or to determine the tax liability of a person. 26 U.S.C.A. § 7602 (West 1989). Congress, however, did not give the IRS the power to enforce its own summonses. Instead, the IRS must prove itself entitled to enforcement in district court. *See United States v. Bisceglia*, 420 U.S. 141, 146 (1975). In order to justify a court order enforcing a summons, the IRS must produce prima facie proof of the following facts:

1. The summons was issued pursuant to a civil tax investigation;

2. The investigation has a legitimate purpose;

3. The information sought may be relevant to that purpose;

4. The information is not already in the possession of the government; and

5. All required administrative steps have been satisfied.

United States v. Powell, 379 U.S. 48, 57-58 (1964); *United States v. Barrett*, 837 F.2d 1341, 1344-43 (5th Cir. 1988); *United States v. Humble Oil & Refining Co.*, 488 F.2d 953, 957-63 & n.14 (5th Cir. 1974); *United States v. Theodore*, 479 F.2d 749, 754-55 (4th Cir. 1973); *United States v. Matras*, 487 F.2d 1271, 1274-75 (8th Cir. 1973).

If the government meets its prima facie burden to justify enforcement, the resisting party may rebut the government's proof by showing that issuance of the summons would constitute an abuse of the court's process. For example, a summons is issued in bad faith and cannot be enforced if it is intended to harass the party or to apply pressure in connection with a collateral dispute. *Powell*, 379 U.S. at 57-58. If the resisting party raises bad faith, the court is entitled to permit discovery concerning the underlying facts. *Powell*, 379 U.S. at 57-58; *Barrett*, 837 F.2d at 1344-45.

Powell sets a careful balance between two competing concerns: the desire to avoid unnecessary delays in enforcement versus the need to afford some level of protection from abuses of summons power. *Powell* recognized that the Congress of its day was concerned with uncontrolled activities of IRS agents, having received "bitter complaints" from taxpayers. *Powell*, 379

U.S. at 54. This concern with abuses of power by the IRS continues to this day. *See Barrett*, 837 F.2d at 1353-54 (Brown, J., dissenting) (Congress aware of millions of taxpayers' complaints). The concern is especially focused on the dangers posed by the invasive and widespread collection of personal data by the IRS, and the misuse of this information by other agencies. *See id.* at 1354 & n.13 ("It has been stated that the IRS probably has more information about more people than any other agency in this country. Consequently, almost every other agency that has a need for information about United States citizens, therefore, logically seeks it from the IRS.") (quoting S. Rep. No. 94-938, *reprinted in* 1976 U.S.C.C.A.N. 3748).

Powell protects against abuse of governmental power by requiring the taxing authority to come forward and commit itself, under oath, to the legitimacy of the investigation and the propriety of its motives. The *Powell* standard effectively guards against abuse because:

1. The resisting party, as well as the court, is able to cross-examine the IRS agent in order to test his or her veracity and competency.

2. The filing of an affidavit based on personal knowledge creates a solemn and enforceable duty on the part of the government and its agents to accurately state the facts supporting the issuance of the summons. The potential consequences of perjury, contempt, and loss of official credibility help ensure that the government will not seek to justify a summons on concocted or doubtful grounds.

3. Requiring the government to explain its desire for the information sought gives the resisting party a fair opportunity to rebut the government's explanation.

Otherwise, the resisting party would be placed in the untenable position of having to rebut the unknown.

B. The Hearsay-Based Declarations Adduced by the IRS in This Case Do Not Satisfy *Powell*.

The government failed to satisfy the *Powell* standard in this case. The declarations filed by Deanehan and Brosig do not contain competent, admissible testimony that the Mexican investigation was legitimate and civil in nature, that the documents sought might be relevant to the investigation, that the Mexican taxing authority did not already have possession of the requested information, or that the Mexican authority followed all applicable administrative prerequisites. The statements in the affidavits pertaining to the putative Mexican investigation are entirely hearsay characterizations of what the IRS agent was purportedly told by an unidentified Mexican official.

The dangers of hearsay testimony are well documented in Anglo-American jurisprudence. *See Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Such dangers prompted the framers of the Constitution to create an express right in criminal trials to face one's accuser. U.S. Const. amend. VI; *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (Confrontation Clause applies in administrative setting).

The principal danger of hearsay is, of course, its unreliability. Hearsay of an absent witness is unreliable for several reasons. First, the declarant is not under oath and the compulsion of perjury, and is thus less likely to tell the truth and avoid mistakes. *See Maryland v. Craig*, 497 U.S. 836, 845-46 (1990); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959). Second, even though the person offering the testimony may be under oath, testimony that is based on "best knowledge" or "belief" is largely immune from the threat of prosecution for

perjury. *See Price v. Rochford*, 947 F.2d 829, 832 (7th Cir. 1991). Third, the declarant is not available for cross-examination — our judicial system's primary mechanism for assessing the accuracy and credibility of testimony. *See Ohio v. Roberts*, 448 U.S. 56, 63-64 & n.6 (1980). Fourth, hearsay testimony compounds the vagaries of human perception — such testimony is based on one person's perception of what another person said about how the second person perceived an event or occurrence. Fifth, the factfinder is deprived of the opportunity to judge the non-verbal demeanor of the declarant. *See Barber v. Page*, 390 U.S. 719, 721 (1968). For all of these reasons, the hearsay-based beliefs of Deanehan and Brosig are not sufficient to assure even the minimum level of protection against abuse of the summons power required by *Powell*.

Further, issuance of a summons upon request under the Mexican TIEA did not require significant discretion on the part of the IRS agent. In fact, the agreement states that tax information *shall* be exchanged upon request, and that the transmission of requested information shall be *automatic*. Mexican TIEA, art. 4, §§ 2, 4. Given this lack of discretion, the good faith of the IRS agent in complying with the TIEA is commendable but hardly probative of the legitimacy of the request for information.

In sum, the trial court's acceptance of the hearsay-based IRS affidavits emasculated the basic protections guaranteed in *Powell*. *Cf. Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 322 (1985) (relying on adversary system to provide check on unsubstantiated allegations in summons affidavit).

C. Affording Lesser Protection to Foreign Taxpayers Violates the United States Constitution and International Law.

The Mexican and United States Governments have long

agreed that each country will provide equal treatment and respect to the civil rights of citizens of either country. *See Convention Between the United States of America and Other American Republics Regarding the Status of Aliens*, June 6, 1930, 46 Stat. 2753, 2754. This concern for equal treatment of citizens and aliens was carried forward in the Mexican TIEA, which prohibits the kind of procedural double standard involved in this case:

> If information is requested by a Contracting State pursuant to paragraph 4, the requested State *shall obtain the information requested in the same manner*, and provide it in the same form, *as if the tax of the applicant State were the tax of the requested State and were being imposed by the requested State*.

Mexican TIEA, art. 5 (emphasis added). In other words, the United States must afford the *same* level of protection to Cemaj as it would to a United States citizen being investigated by the IRS.

Similarly, Article XXV of the 1992 Tax Treaty with Mexico mandates non-discrimination between citizens and nationals of another state by requiring that a national of one Contracting State may not be subject to taxation or connected requirements in the other Contracting State which are different from or more burdensome than the taxes and connected requirements imposed upon a national of that other State in the same circumstances. *See Convention and Protocol Between the Government of the United States and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income*, art. XXV, ¶ 1, S. Treaty Doc. No. 7, 103rd Cong., 1st Sess. 52 (1993).

The Fifth Circuit's holding violates these international agreements by allowing a Mexican national's financial privacy to

be invaded upon a significantly lesser showing than is required to abrogate the privacy rights of a United States citizen.

There are also serious constitutional concerns raised by the Fifth Circuit's failure to afford the protection guaranteed by *Powell* to foreign nationals. The Fifth Amendment protects aliens from "deprivation of life, liberty, or property without due process of law." *Matthews v. Diaz*, 426 U.S. 76, 77 (1976). Under equal protection analysis, classifications based on alienage are subject to either heightened scrutiny, *e.g.*, *Pyler v. Doe*, 457 U.S. 202, 224 (1982); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976), or rational basis scrutiny. *See* Laurence H. Tribe, *American Constitutional Law* § 16-33, at 1610-11 (2d ed. 1988).

The government's interpretation of § 7602 and *Powell* uses alienage as a classification to treat United States citizens differently from foreign nationals in a constitutionally impermissible way: A United States citizen's right to privacy of financial records may only be abrogated upon competent proof that satisfies *Powell*, but a foreign national's right to privacy of financial records may be abrogated by an affidavit consisting solely of unsubstantiated hearsay. Whatever standard of review is employed, the government's interpretation must fail.[1]

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1. The IRS provides in its training manual that U.S. agents seeking information on taxpayers in foreign countries must provide a description of the tax issue or scheme involved, a detailed statement of the information needed and why it is needed, efforts made to secure the information, and reasons why the agent believes the information exists. *See* IRS *International Issues Training Manual, Student Text*, TPDS No. 83285X, Doc. 94-20981 (Nov. 1, 1993) (available on LEXIS, Tax Analysts, Tax Notes Today, Aug. 3, 1994). The IRS provided no such information concerning the purported Mexican tax investigation in this case.

II.

THE TRIAL COURT DENIED PETITIONERS THE RIGHT TO CONDUCT MEANINGFUL DISCOVERY AS TO THE LEGITIMACY OF THE PUTATIVE MEXICAN TAX INVESTIGATION.

In a § 7602 summons enforcement proceeding, the taxpayer or third-party recordkeeper is entitled to an adversary evidentiary hearing and a *meaningful* opportunity to rebut the claimed basis for the summons. *See United States v. Southeast First Nat'l Bank*, 655 F.2d 661, 665-67 (5th Cir. 1981). While the trial court generally has discretion to deny pre-hearing discovery where questioning of the IRS agent would be the "substantial equivalent" of such discovery, *see United States v. Harris*, 628 F.2d 875, 883 (5th Cir. 1980), a trial court abuses its discretion when it denies the taxpayer a real opportunity to discover the facts bearing on the legitimacy and reasonableness of the summons, *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1970).

Pre-hearing discovery is generally not required based on the premise that knowledgeable government agents will be available for questioning by the taxpayer and court at the hearing. *See, e.g., United States v. Wyatt*, 637 F.2d 293, 301 (5th Cir. 1981); *United States v. Armada Petro. Corp.*, 562 F. Supp. 43, 54 (S.D. Tex. 1982), *aff'd*, 700 F.2d 706 (Temp. Emerg. Ct. App. 1983). However, where the IRS agents are ignorant of the underlying facts, the government must provide other witnesses who are competent to give admissible testimony. *See Southeast First Nat'l Bank*, 655 F.2d at 667 n. 5. Otherwise, the taxpayer is placed in a "Catch 22" position where he must attempt to rebut the IRS' statements without any opportunity to discover the underlying facts. *See id.* at 667. Competent factual testimony from an official who has personal knowledge concerning the tax investigation is "absolutely essential" to the taxpayer's right to challenge the enforcement of the summons. *Id.* at 667-68.

III.

CONGRESS DID NOT EXPRESSLY OR IMPLIEDLY AUTHORIZE THE IRS TO ENTER INTO A TAX INFORMATION EXCHANGE AGREEMENT WITH *ANY* FOREIGN COUNTRY; CONGRESS SPECIFICALLY NAMED THE COUNTRIES WITH WHOM SUCH AGREEMENTS CAN BE REACHED, AND MEXICO IS NOT ON THIS LIST.

Congress authorized the Secretary of the Treasury to enter into a tax information exchange agreement ("TIEA") with certain Caribbean and Central American countries in 26 U.S.C.A. § 274(h)(6)(C) (West Supp. 1995). Mexico is not a beneficiary country under this statute. Therefore, the Mexican TIEA is not authorized by law and the summons issued pursuant to the Mexican TIEA is invalid.

A. Internal Revenue Code § 274: Business Deductions for Conventions in Qualified "Beneficiary Countries"

Section 274 of the Internal Revenue Code generally disallows business tax deductions for persons who attend conventions or similar meetings *outside* of the "North American Area," except where the convention is held in a "beneficiary country." *Id.* § 274(h). The North American Area consists of "the United States, its possessions, and the Trust Territory of the Pacific Islands, and Canada and *Mexico*." *Id.* § 274(h)(3)(A). Thus, § 274 provides a mechanism for extending tax deductibility for conventions held in "beneficiary countries" outside of North America.

In order to host tax-deductible business conventions under § 274, the beneficiary country must have a TIEA with the United States. In connection with this requirement, the Secretary is given

the power to enter into such agreements with beneficiary countries: "The Secretary is authorized to negotiate and conclude an agreement for the exchange of information with any *beneficiary country*." *Id.* § 274(h)(6)(C)(i). Section 274 also provides that a TIEA entered into with a beneficiary country may be effectuated through the IRS' discovery and enforcement powers under chapter 78 of the Internal Revenue Code, including the administrative summons power at issue in this case. 26 U.S.C.A. § 7602 (West 1989). Thus, the Secretary's power to enter into a TIEA and to issue summonses pursuant to such an agreement is dependent on whether the country is a "beneficiary country."

B. Presidential Designation of "Beneficiary Countries" Under the Caribbean Basin Initiative

According to § 274, " 'beneficiary country' has the meaning given to such term by section 212(a)(1)(A) of the Caribbean Basin Recovery Act [19 U.S.C. § 2702(a)(1)(A)]; except that such term shall include Bermuda." 26 U.S.C.A. § 274(h)(3)(B) (West Supp. 1995). The Caribbean Basin Recovery Act, otherwise known as the Caribbean Basin Initiative ("CBI"), 19 U.S.C.A. §§ 2701-2707 (West Supp. 1995), was intended to promote the economy and export potential of the countries in the Caribbean region. Pub. L. 101-382, § 202 (1990), 104 Stat. 655 ("Congressional Findings" note to 19 U.S.C.A. § 2701 (West. Supp. 1995)).

The CBI provides a list of names of countries which the President can proclaim to be a "beneficiary country" for purposes of the Act. 19 U.S.C.A. § 2702(b) (West Pamph. Supp. 1995). However, the President's ability to designate beneficiary countries is closely controlled by the statute. *Id.* § 2702(c). The CBI also sets out a number of disqualifying factors. *Id.* § 2702(b)(1)-(7). Thus, Congress created a highly selective

process for countries to be considered as candidates as "beneficiary countries."

C. Mexico Is Not a "Beneficiary Country."

Mexico is not listed in the CBI as a candidate for designation as a beneficiary country. *See Barquero v. United States*, 18 F.3d 1311, 1314 (5th Cir. 1994). Congress did not choose to give the IRS the power to enter into a TIEA with Mexico, or to enforce such an agreement with its summons power. If Congress had wanted to authorize such an agreement, it would have either added Mexico to the list of beneficiary countries in the CBI, or alternatively named Mexico as a beneficiary country in § 274 itself, as it did with Bermuda. 26 U.S.C.A. § 274(h)(6)(B) (West Supp. 1995). Congress knows how to add names of countries to a statute when it wants to. *See, e.g.*, Technical and Miscellaneous Revenue Act of 1988, 100th Cong., Pub. L. 100-647, § 6132(a) (adding Virgin Islands to 26 U.S.C. § 936(d)(4)(B)); *see also Boureslan v. Aramco*, 892 F.2d 1271, 1274 (5th Cir. 1990) (en banc) (intent to create extraterritorial civil rights jurisdiction not inferred in statute, Congress knows how to create such jurisdiction when it wants to), *aff'd sub nom. EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

D. The IRS' Power to Enter into TIEAs Was Not Unfettered by the Amendment to the Foreign Sales Corporation Statute.

Notwithstanding Congress' choice not to include Mexico in the list of beneficiary countries, the IRS argued that Congress gave it the authority to enter into a TIEA with any country in the world by making an oblique parenthetical reference to § 274 in an unrelated tax statute. Section 927 of the Internal Revenue Code deals with the taxation of foreign sales corporations ("FSCs"). Prior to its amendment in the Tax Reform Act of 1986, FSCs could only be recognized in CBI beneficiary countries. In 1986,

§ 927(e)(3) was changed to include the following italicized language:

> For purposes of this title, the term "FSC" shall not include any corporation which was created or organized under the laws of any foreign country unless there is in effect between such country and the United States —
>
> > (A) a bilateral or multilateral agreement described in section 274(h)(6)(C) *(determined by treating any reference to a beneficiary country as being a reference to any foreign country and applying such section without regard to clause (ii) thereof)*. . . .

26 U.S.C.A. § 927(e)(3) (West Supp. 1995) (emphasis added).

The government convinced the Fifth Circuit that this parenthetical reference to § 274 had the collateral effect of completely eliminating any limits to the countries with which the IRS can execute TIEAs. *See Barquero*, 18 F.3d at 1314-15. This argument depends on the dubious thesis that the parenthetical reference, which contains *no language* granting additional powers to the IRS,[2] was intended to obviate all of the restrictions applicable to beneficiary countries and place complete discretion in the IRS to enter into a TIEA and act as a tax-information-gathering-arm of *any* foreign country. The idea that Congress would give these sweeping powers to the IRS in such an off-hand manner is astounding and is belied by the complete absence of any discussion of such an expansion in the legislative history

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2. In contrast, § 274's grant of authority is explicit: "The Secretary is authorized to negotiate and conclude an agreement for the exchange of information with any beneficiary country." 26 U.S.C.A. § 274(h)(6)(C) (West Supp. 1995).

accompanying the Tax Reform Act of 1986. *Cf. Boureslan*, 892 F.2d at 1274 (act is "curiously silent" concerning claimed creation of extraterritorial civil rights jurisdiction).

IV.

THE QUESTIONS PRESENTED ARE IMPORTANT.

A. As Recognized by the Trial Court, in This Era of Increasingly Close Commercial Ties Between the United States and Mexico, the Power of the IRS to Seize Records of Mexican Citizens from United States Banks Must Be Clarified.

Although District Judge Hayden Head felt himself obligated by *Barquero v. United States*, 18 F.3d 1311 (5th Cir. 1994) to order the IRS summons enforced, he was troubled by the lack of judicial guidance concerning the extent to which the rights of Mexican citizens with American bank accounts are protected by United States law. In granting a stay of enforcement pending appeal, the court made the following comments:

> I think a substantial legal question is being presented. I think it's important for the Circuit Courts to give guidance to the Districts on issues such as this. The relationships between the United States and Mexico and our neighbors to the south are going to be as a matter of public policy evermore entwined. There will be no doubt increasing contact between American banks and foreign governments and vice versa. I think the ground rules need to be very clear. We've just seen NAFTA passed. We have just seen where the president is intent on having a free-trade zone all the way from Alaska to

> Argentina. The taxing authorities will be governed by a treaty. The issue that is raised here will be whether or not the IRS must have some personal knowledge of the issues involved and whether or not we're going to rely upon the statements of taxing authorities from other jurisdictions that will deal with the way our banks handle foreign deposits.

Transcript of Hearing on Stay Pending Appeal, at 14-15 (Dec. 12, 1994). Requests for issuance of IRS summonses by the Mexican government are likely to become even more frequent in the future. Direction from this Court as to how *Powell* should be applied in foreign request cases would greatly assist foreign account holders and United States banks in responding to such summonses, and would also assist the IRS in its efforts to obtain prompt judicial summons enforcement. Further, because of the expedited nature of the summons enforcement process and the fragility of privacy rights, it is particularly important that this Court provide such guidance for the future.

B. The Decision of the Lower Courts Places *United States v. Stuart* in Conflict with *United States v. Powell.*

The lower courts, relying on *Barquero v. United States*, 18 F.3d 1311 (5th Cir. 1994), interpreted this Court's decision in *United States v. Stuart*, 489 U.S. 353 (1989) as limiting the applicability of the protective standard of *United States v. Powell* when a summons is issued by the IRS at the behest of a foreign country. The courts interpreted *Stuart* as standing for the proposition that, even though *Powell* requires the government to justify enforcement through competent proof, when the summons is issued by the IRS acting in behalf of a foreign government the IRS need only represent that it in good faith believes what it has been told by the foreign government. As

discussed earlier, this interpretation effectively denies the protection of *Powell* to bank account holders who are foreign citizens. *Stuart*, however, does not bear this interpretation.

Stuart approved an affidavit similar to that relied on by the government in this case, but the affidavit in *Stuart* was not challenged on grounds of witness incompetency. *Stuart*, 489 U.S. at 360; *see also Stuart v. United States*, 813 F.2d 243, 245 (9th Cir. 1987), *rev'd*, 489 U.S. 353 (1989). Instead, *Stuart* considered the issue of whether the IRS was required to determine, in connection with a summons issued at the request of the Canadian government, whether the Canadian investigation had been in effect referred for criminal prosecution for purposes of 26 U.S.C. § 7602(c).

The Court did comment that the IRS affidavit "plainly satisfied the requirements of good faith we set forth in *Powell* and have repeatedly reaffirmed." *Id.* at 360 (citing *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985); *United States v. Arthur Young & Co.*, 465 U.S. 805 (1985)). But this dicta does not purport to address the *competency* of the IRS affidavit, as illustrated by the two cited cases, *Tiffany Fine Arts* and *Arthur Young & Co.* Neither of these cases involved a summons requested by a foreign country. Further, in each case the government presented detailed evidence through competent witnesses explaining the grounds for the investigation and why the information requested was pertinent to the investigation. *See Tiffany Fine Arts*, 469 U.S. at 313; *Arthur Young & Co.*, 465 U.S. at 808-09. The taxpayers in these two cases were afforded all the protection required by *Powell*. *Stuart* does not support denying the same level of protection to Petitioners in this case.

C. The Court of Appeals Has Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings.

The Court should grant this petition because the Fifth Circuit, in upholding a district court order enforcing an IRS summons based on hearsay testimony, has clearly departed from the accepted and usual course of judicial proceedings. Sup. Ct. R. 10.1(a). Neither this Court nor any lower court, as far as Petitioners have been able to find, have ever held that the summons enforcement standard of *United States v. Powell* is satisfied by a hearsay affidavit by an IRS agent with no personal knowledge concerning the alleged tax investigation. Indeed, the Fifth Circuit itself has indicated otherwise. *See United States v. Southeast First Nat'l Bank*, 655 F.2d 661, 667 n.5 (5th Cir. 1981) (if agents do not have personal knowledge, IRS must produce supervisors with knowledge). When presented with analogous situations where action of the United States against an individual was requested by a foreign government, this Court has consistently held that the request must be supported by *competent* evidence. *See Glucksman v. Henkel*, 221 U.S. 508 (1911); *Rice v. Ames*, 180 U.S. 371 (1901). Further, the Fifth Circuit has provided no rationale for suspending the usual requirement that affidavits be made on personal knowledge, Fed. R. Civ. P. 56(e), or the rule of evidence that prohibits the admission of hearsay, Fed. R. Evid. 802; *see also id.* 1011(b) (rules apply to civil actions). Under these circumstances, the Court should exercise its power of supervision and correct the errors of the lower courts.

D. Special Dangers Arise When the IRS Acts as an Investigatory Arm of a Foreign Government.

In issuing and seeking to enforce the summons, the IRS is, in effect, acting as an agent of the Mexican government. This Court has warned that the IRS should not be allowed to use its summons powers merely as an information-gathering arm of another agency, as opposed to acting in pursuit of its own legitimate

investigation. *See United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 317 (1978). Congress has also recognized the danger of allowing the IRS to act as an information clearinghouse for other state agencies. *See Barrett*, 837 F.2d at 1354 & n.13. These concerns, which this case brings to the forefront, are an additional reason why the *Powell* standard should not be slackened in foreign-request cases. If anything, the courts should be more wary of enforcing summons that have been issued by the IRS as surrogate for a foreign government.

E. American Banks Usually Will Not Have the Incentive to Litigate the IRS' Right to Enforcement of a Foreign-Request Summons In Behalf of a Foreign Account-Holder.

In this case, the Bank has undertaken the burden and expense of opposing enforcement of the IRS summons in behalf of its Mexican customer and has now brought the issue before this Court. However, banks as "third-party recordkeepers" under the IRS summons statute do not usually have the incentive to withhold records sought by the IRS. 26 U.S.C.A. § 7609 (West 1989). As long as the bank hands over the records in "good faith reliance on the certificate of the Secretary or an order of a court," it cannot be held liable to the account holder or any other person for the disclosure. 26 U.S.C.A. § 7609(i)(3). On the other hand, a bank that refuses to obey a summons is subject to be held in contempt. *Id.* § 7604(b). Thus, while this situation certainly will be repeated, it will tend to evade review because Mexican account holders will often not possess the wherewithal to fund their own court contest. Moreover, even account-holders who have the means to resist disclosure will hesitate to undertake the process in the face of the opinion of the Fifth Circuit in this case and in *Barquero* which make court approval of a foreign-request summons virtually automatic. Thus, this case presents an excellent and timely opportunity to the Court to address these issues, an opportunity that may not be readily available in the future.

CONCLUSION

This Court's decision in *United States v. Powell* stands for the proposition that a court cannot order enforcement of an IRS summons unless the government establishes a prima facie case entitling it to enforcement. Until the Fifth Circuit's decision in *United States v. Barquero* and its decision below, incompetent evidence has never been sufficient to satisfy *Powell*. Petitioners respectfully ask the Court to grant this petition for writ of certiorari in order to correct the Fifth Circuit's departure from the letter and spirit of *Powell*.

Respectfully submitted,

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APPENDIX A — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 12, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60623

ABRAHAM NEIMAN CEMAJ,

Plaintiff-Appellant,

INTERNATIONAL BANK OF COMMERCE,

Intervenor-Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING

(May 12, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:

Appendix A

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

s/ illegible

United States Circuit Judge

APPENDIX B —OPINION AFFIRMING JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 28, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60623
Summary Calendar

ABRAHAM NEIMAN CEMAJ,

Plaintiff-Appellant,

INTERNATIONAL BANK OF COMMERCE,

Intervenor-Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(CA L-91-103)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Appendix B

The judgment is AFFIRMED, essentially for the reasons set forth by the district court in its thorough Order Granting Summary Enforcement of Summons. The district court correctly relied upon this court's recent decision in *United States v. Barquero*, 18 F.3d 1311 (5th Cir. 1994). Remarkably, in his briefs the plaintiff makes absolutely no effort to explain why *Barquero* is not dispositive of this appeal.

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION ENTERED JUNE 27, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. L-91-103

ABRAHAM NEIMAN CEMAJ

V.

UNITED STATES OF AMERICA

FINAL JUDGMENT

Final judgment is rendered denying plaintiff's petition to quash Internal Revenue Service summons and granting defendant's motion for summary enforcement of summons.

ORDERED this 20 day of June, 1994.

s/ H. W. Head, Jr.
H. W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER GRANTING ENFORCEMENT OF SUMMONS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, CORPUS CHRISTI DIVISION ENTERED JUNE 6, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. L-91-103

ABRAHAM NEIMAN CEMAJ

V.

UNITED STATES OF AMERICA

V.

INTERNATIONAL BANK OF COMMERCE

ORDER GRANTING SUMMARY ENFORCEMENT OF SUMMONS

Mexico's authorities, pursuant to a tax information exchange agreement (TIEA), requested tax information from the United States authorities with respect to plaintiff Abraham Neiman Cemaj. Because the Internal Revenue Service did not have the requested information in its possession, it issued a summons to the Bank of International Commerce seeking information with respect to two accounts, numbered 180-4964-16 and 75-2177-16. Cemaj and the bank then filed a petition to quash the summons, advancing the following arguments:

(1) the TIEA between the United States and Mexico is unconstitutional, void, and unenforceable because (a) Congress did not give the President the authority to

enter into the agreement, and (b) the agreement was not transmitted to Congress within sixty (60) days of signature in compliance with 1 U.S.C. § 112b;

(2) even if the TIEA is valid, the IRS cannot use its power of administrative summons to obtain documents not in its possession to satisfy Mexico's request under the TIEA;

(3) even if the IRS can use its summons power to satisfy Mexico's request, the summons should not be enforced because: (a) the summons does not comply with the Federal Right to Financial Privacy Act of 1978; 12 U.S.C. § 3401, *et seq.*; (b) the government has failed to submit any proper proof to meet its burden of showing good faith; (c) the government cannot meet its burden of showing good faith because the summons is not issued for a proper or legitimate purpose; and (d) the summons is overbroad.

The government moves for summary enforcement of the summons. At the hearing on the motion, the government announced it does not wish to pursue the enforcement of the summons as to account number 180-4964-16. Accordingly, the Court addresses only the enforceability of the summons as to account number 75-2177-16.

I. *Whether the TIEA is Valid*

A. Authority to Enter into the Agreement

Petitioners first argue the TIEA is unconstitutional because Congress did not give the President the authority to enter into the agreement. 26 U.S.C. § 274(h)(6)(C) and 26 U.S.C. § 927(e)(3),

"when read together, provide specific congressional authorization for the President's decision to enter into the challenged TIEA." *Barquero v. United States*, No. 93-7447, slip op. 3642, 3646 (5th Cir. April 20, 1994). Petitioners' first argument must fail.

B. Transmission to Congress

Petitioners argue the TIEA with Mexico was not transmitted to Congress, as required by 1 U.S.C. § 112b, and is therefore invalid. The government contends this argument is frivolous because the agreement was transmitted to Congress on April 12, 1990 as Agreement 90-85. As proof of transmission, the government attaches copies of the State Department's official correspondence regarding this matter. See the copies of letters dated April 12, 1990, from the Assistant Legal Advisor, Department of State, to the Speaker of the House, Chairman of the Senate Committee on Foreign Relations, and the President of the Senate. Petitioner also attaches a declaration stating those are true and correct copies of the letters. Petitioners do not contest that evidence, thus failing to raise a fact issue. The Court finds this argument lacks merit.

Further, petitioners object to the use of the TIEA because it has not been properly proven pursuant to 1 U.S.C. § 112a, which requires the Secretary of State to publish annually a compilation of international agreements that have been signed during each calendar year. That compilation is to serve as the legal evidence of the international agreements contained within it, and petitioners argue that the Secretary's failure to so publish means the TIEA cannot be proven. Petitioners cite no authority for the proposition that § 112a provides the only method of proving an agreement. Further, 1 U.S.C. § 113 lists other ways of proving

international agreements without authentication, suggesting the method set forth in § 112a is not the only means of proving the existence of such an agreement. The Court overrules petitioners' objection.

II. *Whether the IRS Can Use Its Power of Administrative Summons in this Case*

Petitioners argue that even if the agreement is valid, the section giving the IRS the power of summons, 26 U.S.C. § 274(h)(6)(D), was never amended to give the IRS the power to summons to satisfy requests made pursuant to a TIEA with a non-beneficiary country. Consequently, petitioners argue, § 274(h)(6)(D) allows the IRS to use its summons power to fulfill only requests made under § 274(h)(c)(C) agreements. The IRS has the authority to issue the summons on behalf of the competent authority of Mexico. *Barquero v. United States,* No. 93-7447, slip op. 3642, 3648 (5th Cir. April 20, 1994).

III. *Whether the Summons Must Comply With the Financial Privacy Act*

The parties disagree as to whether the summons must comply with the Federal Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401, *et seq.* Petitioners argue the IRS must comply with the provision of the Act because of the following provision in the TIEA:

> If the United States is requested to obtain the types of information covered by § 3402 of the Right of Financial Privacy Act of 1978 (12 U.S.C.A. § 3402) as in effect at the time of the signing of this Agreement, it shall obtain the

> requested information pursuant to that provision . . .

¶ 4(b) of the TIEA.

Section 3402 is the provision requiring that the government must follow certain steps to obtain from a financial institution information contained in the financial records of any customer of that institution. It provides that § 3402 does not apply if § 3413 provides otherwise. Section 3413 provides: "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by Title 26 [the Internal Revenue Code]." 12 U.S.C. § 3413(c). Petitioners, however, argue ¶ 4(b) would be unnecessary if the IRS were exempted from compliance with the Act. The language in ¶ 4(b) of the TIEA states that if the *United States* is requested to obtain information *covered by § 3402*, it must comply with the Act. Because ¶ 4(b) does not refer specifically to the IRS, but rather to the United States, its language is not made superfluous by the fact that the IRS is exempted from the Financial Privacy Act. The Court holds the IRS is exempted from compliance with the Act pursuant to the provisions of §§ 3402 and 3413.

IV. *Whether the Government's Evidence is Sufficient to Support its Burden*

The government attached to its motion for summary enforcement the declarations of Regina Deanehan, the competent authority for the IRS, and of Carlos A. Brosig, the IRS Revenue Agent assigned the responsibility of issuing the summons in this case. Petitioners argue those declarations do not satisfy the government's burden of showing good faith for the following reasons: (1) they are not affidavits, as required by Rule 56(e) of

the Federal Rules of Civil Procedure; and (2) the declarations contain conclusory statements and hearsay that would not be admissible in evidence.

A. Use of Declarations Rather Than Affidavits

Rule 56(e) requires the attachment of affidavits as support for motions for summary judgment. Petitioners argue the government submitted statements that clearly are not affidavits because they contain no jurat or notary signature. Because the statements are not affidavits, petitioners argue, the requirements of Rule 56 are not satisfied.[1] Accordingly, the declarations are not competent evidence and the government does not meet its burden.

Though petitioners correctly state the requirements under Rule 56(e), a statutory exception to that requirement exists under 28 U.S.C. § 1746, which permits unsworn declarations to substitute for an affiant's oath if the declaration meets a required format. *Nissho-Iwai American Corp. v. Kline,* 845 F.2d 1300, 1306 (5th Cir. 1988). Both declarations attached by the government comply with the required format.

B. Hearsay and Conclusory Statements

Petitioners argue the Deanehan declaration contains hearsay statements in paragraphs four and six, and conclusory opinion statements in paragraphs two, three, five, and six. Further, petitioners argue, the Brosig statement contains hearsay

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1. Petitioners cite *United States v. Roundtree,* 420 F.2d 845, 850 (5th Cir. 1969) as support for the proposition that the Federal Rules of Civil Procedure, including the requirements for summary judgment proof, are applicable to summary enforcement proceedings.

statements in paragraph five and conclusory statements in paragraph six.

1. Hearsay

None of the statements in paragraph five of the Brosig declaration can be considered hearsay — he simply describes the attachment of evidence of sending notice of the summons to Cemaj. He describes no -out-of-court statement. The statements in paragraphs four and six of the Deanehan statement detail the steps she took in determining whether the request fell within the scope of the agreement between the United States and Mexico. Deanehan relates those steps in an attempt to prove the IRS's good faith, as defined by *United States v. Powell,* 379 U.S. 48, 85 S. Ct. 248 (1964), in issuing the summons. Though she describes assurances other parties made to her, those assurances are not described to demonstrate the truth of the assurances. Rather, the assurances are described to show that the steps taken constitute good faith. Accordingly, the descriptions of those assurances are not hearsay.

2. Conclusory Statements

Deanehan's statements in paragraphs two, three, five, and six again seek to demonstrate good faith by detailing her investigation. They are not conclusory. Further, the law is clear that the government may show its good faith by a simple affidavit by the agent issuing the summons. *See, e.g., United States v. Davis,* 636 F.2d 1028, 1034 (5th Cir.), *cert. denied,* 454 U.S. 862, 102 S. Ct. 320 (1981). Brosig's statement in paragraph six complies with that minimal burden.

3. Conclusion

For the above stated reasons, the Court finds the affidavits to be competent evidence for purposes of the motion for summary enforcement, and sufficient to rebut the conclusory assertion that the IRS did not act in good faith on satisfying Mexico's request for information.

V. *Whether the IRS's Summons Should be Enforced*

To have it summons enforced, the IRS must first demonstrate its good faith in issuing the summons. *United States v. Stuart,* 489 U.S. 353, 359, 109 S. Ct. 1183, 1188 (1989) (citing *United States v. Powell,* 379 U.S. 48, 52-57, 85 S. Ct. 248, 252-54 (1964)). Good faith is defined as follows:

> [The IRS Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed — in particular, that the "Secretary or his delegate," after investigation has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

Id. (quoting *Powell,* 379 U.S. at 57-58, 85 S. Ct. at 254-55).

Once the IRS demonstrates good faith in issuing a summons, it is entitled to an enforcement order unless the taxpayer can show

that the IRS is attempting to abuse the Court's process. *Id.* at 360, 109 S. Ct. at 1188. The taxpayer carries the burden of proving an abuse of the Court's process. *Id.* (citing *Powell*, 379 U.S. 48, 58, 85 S. Ct. 248, 255 (1964)). The taxpayer can show such abuse if the summons were issued for an improper purpose reflecting on the good faith of the particular investigation. *Id.*

A. The Government's Showing of Good Faith

The government may show its good faith by a simple affidavit, and its burden is minimal. *United States v. Davis*, 636 F.2d 1028, 1034 (5th Cir.), *cert. denied*, 454 U.S. 862, 102 S. Ct. 320 (1981) (citing *United States v. McCarthy*, 514 F.2d 368, 372 (3d Cir. 1975); *United States v. Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979)). In this case, the government produced Deanehan's declaration stating she determined the Mexican request for information was proper under the agreement — the Mexican authorities requested information to enable them to determine the correct tax liability of Cemaj under Mexican law. She further stated that because of Cemaj's allegations that the Mexican government had an improper purpose, Deanehan investigated further. In response to her additional inquiries, the Mexican Competent Authority "steadfastly affirmed" the information was being used to determine Cemaj's tax liability.

Deanehan further stated that she is satisfied that the requested information is relevant to determine Cemaj's tax liability, that the information is not within the possession of the IRS nor of the Mexican tax authorities, and that the same type of information can be obtained by the Mexican authorities under Mexican law.

The government also produced Brosig's declaration stating

he complied with all required administrative steps, as set forth in 26 U.S.C. §§ 7603 and 7609. The statements in those declarations satisfy the *Powell* requirements. *See Stuart, supra; Barquero, supra.* The government is entitled to enforcement of its summons unless petitioners can rebut its showing of good faith.

Petitioners attempt to rebut that showing by arguing the government cannot show the summons was issued for a legitimate or proper purpose. They support this contention by producing Cemaj's affidavit. In his affidavit, Cemaj states: "The Summons . . . has been motivated by a personal vendetta against me for the purpose of harassing me and has been motivated by my business competitors and is not for a legitimate tax investigation." Cemaj provides no further facts to support his conclusory allegations.

Before a taxpayer may have an adversary summons enforcement hearing on a disputed fact issue, the taxpayer " 'must raise in a substantial way the existence of substantial deficiencies in the summons proceedings.' " *United States v. Harris,* 628 F.2d 875, 879 (5th Cir. 1980) (quoting *United States v. Newman,* 441 F.2d 165, 169 (5th Cir. 1971)). While Cemaj alleges what would be an improper purpose, his statement is conclusory and provides no supporting facts. Because he does not raise the issue of the propriety of the purpose of the summons in a substantial way, he is not entitled to a hearing. Further, the Court holds that Cemaj does not rebut the government's showing of good faith.

B. Whether the Government Summons is Overbroad

As their final argument against enforcement of the summons, petitioners contend the summons is overbroad. As

support for their argument, petitioners point out that the requested documents are not sufficiently described and that the summons requests documents relating to an investigation barred by the Mexican statute of limitations.

The summons need only describe with reasonable particularity the requested documents so as to give the witness sufficient information to determine which records are to be produced. *First National Bank of Mobile v. United States,* 160 F.2d 532, 535 (5th Cir. 1947). Accordingly, petitioners' contention that the investigation is time-barred under Mexican law has no bearing on the determination of whether the summons is overbroad.

In this case, the government requested records "relative to account number . . . 75-2177-16 held or controlled by or on behalf of Abraham Neiman Cemaj . . . for the period January 1, 1988 through February 28, 1991 . . ." This request clearly identifies the accounts and the name of the person being investigated — the bank has sufficient information to identify the records sought, and the request is not unduly burdensome. *See Barquero, supra,* at 3650-51. The summons is not overbroad, and the Court orders that the summons be enforced as to account number 75-2177-16 at the International Bank of Commerce.

ORDERED this 31 day of May, 1994

s/ H.W. Head, Jr.
H.W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E — DECLARATION OF REGINA M. DEANEHAN DATED MARCH 25, 1992

DECLARATION OF REGINA M. DEANEHAN

I, REGINA M. DEANEHAN, pursuant to 28 U.S.C. § 1746, declare and state as follows:

1. I am the Assistant Commissioner (International) of the Internal Revenue Service, Washington, D.C. I have served as the Assistant Commissioner (International) since September 1990. I am authorized to act as Competent Authority for the purpose of administering all exchange of information programs under tax treaties and exchange of information agreements by Commissioner of Internal Revenue Delegation Order No. 114 (Rev. 9), effective July 10, 1990, a copy of which is attached to this declaration.

2. By letter dated June 25, 1991, the Government of the United Mexican States ("Mexico") through Alfredo Solloa Junco, the Director General of Federal Tax Audits and Competent Authority delegated to act as such by the Secretary of Finance and Public Credit, made a request for information under the Agreement Between the United States of America and the United Mexican States for the Exchange of Information with Respect to Taxes ("Agreement") to be used to determine the correct tax liability of Abraham Neiman Cemaj under the laws of Mexico.

3. As Competent Authority on behalf of the United States of America, I determined that the Mexican request for information regarding Abraham Neiman Cemaj is a proper request within the scope of the Agreement. I have further determined that it is appropriate for the United States of America to honor this request and thereby lend assistance and support to Mexico as the Agreement contemplates.

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4. The Mexican tax authorities have reason to believe that Abraham Neiman Cemaj may have failed to report all of his income during the periods covered by the summons.

5. I am satisfied that the requested information is not within the possession of the Internal Revenue Service or the Mexican tax authorities; that the requested information as it relates to Abraham Neiman Cemaj may be relevant to a determination of his correct tax liability under Mexican law; and that the same type of information can be obtained by the Mexican tax authorities under Mexican law.

6. Because of the allegations raised by Mr. Neiman Cemaj in his Petition to Quash Internal Revenue Summons, namely that the summons requests information relating to periods outside the statute of limitations of Mexico, extends beyond the date of a final audit which declared no taxes due, and that the information is sought to exert personal pressure on him, my office caused continuing additional inquiries to be made of the Mexican Competent Authority in order to determine whether Mexico had a current legitimate tax interest in seeking the information covered by the summons at issue in this proceeding. The Competent Authority of Mexico has steadfastly affirmed that the Ministry of Finance and Public Credit is conducting an investigation to determine the correct tax liability of Mr. Neiman Cemaj under the laws of Mexico, and that the requested information is not sought to exert personal pressure on Mr. Neiman Cemaj. The Competent Authority of Mexico further confirmed that the investigation is not barred by any statute of limitations or other law that would limit the tax periods subject to audit. It is, therefore, my conclusion that it is appropriate for the United States of America to seek the information requested in the summons at issue.

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7. It is the understanding of the parties to the Agreement, and has been throughout its administration, that information exchanged will only be used by the applicant State for the purposes identified in the Agreement.

8. Exchanged information may only be disclosed as required in the normal administrative or judicial process operative in the administration of the tax system of the applicant State. Improper use of the information, which has been furnished for tax purposes, would be protested and, if continued, would lead to recommendations to terminate the Agreement.

I state under penalty of perjury that the foregoing is true and correct. Executed this 25th day of March, 1992.

s/ Regina M. Deanehan
REGINA M. DEANEHAN

APPENDIX F — BROSIG DECLARATION

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CIVIL ACTION NO. L-91-103

ABRAHAM NEIMAN CEMAJ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Defendant,

v.

INTERNATIONAL BANK OF COMMERCE,

Respondent on Counterclaim.

DECLARATION OF CARLOS A. BROSIG

1. I am an Internal Revenue Service Revenue Agent, assigned to the Laredo, Texas office of the Internal Revenue service.

2. I was assigned the responsibility of issuing the summons on International Bank of Commerce pursuant to a request by the United Mexican States.

3. Attached as Exhibit 1 is a copy of the original summons I served pursuant to that assignment.

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4. As shown on the second page of Exhibit 1, which is a copy of the back of the summons, I served the summons on September 20, 1991 by hand delivering the summons on the International Bank of Commerce and served notice of the summons on Abraham Neiman Cemaj by mailing a copy of the summons to Mr. Neiman Cemaj by certified or registered mail on September 20, 1991.

5. Also attached as part of Exhibit 1 is a true and correct copy of the postal form 3806, Receipt For Registered Mail, Number R373674760, stamped by the Laredo Central Station of the United Postal Service on the same date, reflecting that I sent notice of the summons to Mr. Neiman Cemaj by registered mail.

6. All administrative steps for the issuance of the summons and the giving of notice to Mr. Neiman Cemaj required by the Internal Revenue Code were followed.

7. Also attached as part of Exhibit 1 is Postal Service Form 2865, Return Receipt, for Article No. R373674760 which was returned to our office by the United States Postal Service. The Postal Receipt reflects that the notice of summons was delivered to the addressee on October 3, 1991.

8. To the best of my knowledge there is no on going civil or criminal investigation of Mr. Neiman Cemaj's tax liability in the United States.

9. To the best of my knowledge the information summonsed is not in the possession of the Internal Revenue Service.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 15 day of June, 1992.

s/ Carlos A. Brosig
CARLOS A. BROSIG

Appendix F

EXHIBIT 1

Summons

Department of the Treasury
Internal Revenue Service
Abraham Neiman Cemaj
Campeche No. 290-702
Col. Hipodromo

In the matter of *the Mexican tax liability of Mexico, D.F., Mexico Office of Assistant Commissioner (International)*

Internal Revenue District of ___ Periods *January 1, 1988 through February 13, 1991*

The Commissioner of Internal Revenue

To *International Bank of Commerce*
1200 San Bernardo
At *Laredo Texas 78042-1359*

pursuant to a request under Article 4 of the United States - Mexico Tax Information Exchange Agreement.

You are hereby summoned and required to appear before *Carlos A. Brosig* an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers, and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the

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administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

All records in your possession, custody, or control relative to account numbers 180-4964-16 and 75-2177-16, held or controlled by or on behalf of Abraham Neiman Cemaj, Campeche No. 290-702, Col. Hipodromo, Mexico, D.F., Mexico, for the period January 1, 1988 through February 28, 1991, to include, but not limited to, the following:

A. Bank statements.

B. Signature cards.

C. Opening contracts.

D. Deposit slips.

E. Front and back of checks drawn on the accounts.

In lieu of having an employee of your company appear at the time and place stated herein, compliance with this summons can be effected by having the custodian of the records or such other person who has knowledge of the recordkeeping procedures submit the attached affidavit and return it with the documents described herein by the date and time stated below. The affidavit must be notarized.

Business address and telephone number of Internal Revenue Service officer named above:

P.O. Box 449 Laredo, Texas 78042-0449 (512) 725-2348

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Place and time for appearance:

at *Lincoln-Juarez Bridge, End of IH 35, Room 201, Bldg. 2, Laredo, Texas* on the *21st* day of *October, 1991* at *9:30* o'clock am. Issued under authority of the Internal Revenue Code this *20th* day of *September, 1991*

s/ Carlos A. Brosig	Rev. Agent
Signature of Issuing Officer	Title
s/ Abba Rabbani	Manager
Signature of Approving Officer (if applicable)	Title

* * *

I certify that I served the summons shown on the front of this form on:

Date *September 20, 1991* Time *11 A.M.*

How Summons Was Served

☑ I handed an attested copy of the summons to the person to whom it was directed.

* * *

Signature *Carlos A. Brosig* Title *R.A.*

* * *

Date of Giving Notice: *September 20, 1991* Time: *11:45 AM*

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Name of Noticee: *Abraham Neiman Cemaj*

Address of Noticee (if mailed): *Campeche No. 290-702: Col. Hipodromo Mexico, D.F. Mexico*

How Notice Was Given

☑ I gave notice by certified or registered mail to the last known address of the noticee.

* * *

Signature *Carlos A. Brosig* Title *R.A.*

* * *

APPENDIX G — CEMAJ AFFIDAVIT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

CASE NO. L-91-103

ABRAHAM NEIMAN CEMAJ

VS.

UNITED STATES OF AMERICA AND INTERNATIONAL BANK OF COMMERCE,

INTERVENOR

AFFIDAVIT

STATE OF TEXAS)
)
COUNTY OF WEBB)

BEFORE ME, the undersigned official, on this day personally appeared ABRAHAM NEIMAN CEMAJ, who is personally known to me and first being duly sworn by law upon his oath, deposed and said:

My name is ABRAHAM NEIMAN CEMAJ. I am over 18 years of age; am of sound mind; have never been convicted of a crime; have personal knowledge of ever statement herein made; and am fully competent to testify to the matters stated herein.

The Summons issued by the Internal Revenue Service regarding bank account numbers 180-4964-16 and 75-2177-16 at International Bank of Commerce has been motivated by a

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personal vendetta against me for the purpose of harassing me and has been motivated by my business competitors and is not for a legitimate tax investigation.

Further affiant sayeth not."

s/ Abraham Neiman Cemaj
ABRAHAM NEIMAN CEMAJ

SUBSCRIBED and SWORN TO before me this 19 day of August, 1992, to certify which witness my hand and official seal.

s/ T. King
Notary Public, State of Texas

APPENDIX H — TAX INFORMATION EXCHANGE AGREEMENT

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED MEXICAN STATES FOR EXCHANGE OF INFORMATION WITH RESPECT TO TAXES

The United States of America and the United Mexican States, desiring to conclude an Agreement for the exchange of information with respect to taxes (hereinafter referred to as the "Agreement"), have agreed as follows:

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Article 1

OBJECT AND SCOPE

1. The objective of this Agreement is to facilitate the exchange of information between the Contracting States on the assessment and collection of taxes, with a view to better enable them to prevent, within their respective jurisdictions, fiscal evasion and fraud, and develop improved information sources for tax matters.

2. The Contracting States shall cooperate with each other to carry out the objective of this Agreement, in conformity with and subject to the limitations of their respective national laws and regulations.

3. Pursuant to the provision of paragraph 2 of this Article, requests for assistance under this Agreement will be executed, except to the extent that:

a) execution of the request would require the requested State to exceed its legal authority or would otherwise be prohibited by legal provisions in force in the State, or when the information requested is not obtainable under the laws or in the normal course of the administration of the requested state or of the other Contracting State, in which case the competent authorities of both Contracting States shall consult with each other to agree upon alternative lawful means for securing assistance;

b) execution of the request would in the judgment of the requested State be contrary to its national security or public policy;

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c) to supply information would disclose any trade, business, industrial, commercial, or professional secret or trade process;

d) to supply information requested by the applicant State to administer or enforce a provision of the tax law of the applicant State, or any requirement connected therewith, would discriminate against a national of the requested State. A provision of tax law, or connected requirement, will be considered to be discriminatory against a national of the requested State if it is more burdensome with respect to a national of the requested State than with respect to a national of the applicant State in the same circumstances. For purposes of the preceding sentence, a national of the applicant State who is subject to tax on worldwide income is not in the same circumstances as a national of the requested State who is not subject to such taxation. The provision of this subparagraph shall not be construed to prevent the exchange of information with respect to the taxes imposed by the United States or Mexico on branch profits or the excess interest of a branch or on the premium income of foreign insurers;

e) the request does not comply with the provisions of this Agreement.

4. The Contracting State shall provide assistance through exchange of information authorized pursuant to Article 4 and such related measures as may be agreed upon by the competent authorities pursuant to Article 5.

5. Information shall be exchanged to fulfill the purpose of this

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Agreement without regard to whether the person to whom the information relates is, or whether the information is held by, a resident or national of Contracting State.

Article 2

TAXES COVERED

1. This Agreement shall apply to the following taxes imposed by or on behalf of a Contracting State:

a) in the case of the United States of America,

(i) Federal income taxes.

(ii) Federal taxes on employment income,

(iii) Federal taxes on transfers to avoid income tax,

(iv) Federal estate and gift taxes,

(v) Federal excise taxes; and

b) in the case of Mexico,

(i) Federal income taxes,

(ii) Federal taxes on employment income,

(iii) in the case of Mexico, the Secretary of Finance and Public Credit or his delegate.

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b) The term "national" means:

(i) in the case of the United States, any United States citizen and any legal person, partnership, corporation, trust, estate, association, or other entity deriving its status as such from the laws in force in the United States; and

(ii) in the case of Mexico, any Mexican citizen and any legal person, partnership, corporation, trust, estate, association, or other entity deriving its status as such from the laws in force in Mexico.

c) The term "person" includes an individual and any legal person, including a partnership, corporation, trust, estate, or association.

d) The term "tax" means any tax to which the Agreement applies.

e) The term "information" means any fact or statement, in any form whatever, that may be relevant or material to tax administration and enforcement, including (but not limited to):

(i) testimony of an individual, and

(ii) documents, records or other personal property of a person or Contracting State.

f) The terms "applicant State" and "requested State" mean, respectively, the Contracting State applying for or receiving information and the Contracting State providing or requested to provide such information.

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g) For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term "United States" means the United States of America.

h) For purposes of determining the geographical area within which jurisdiction to compel production of information may be exercised, the term "Mexico" means the United Mexican States.

2. Any term not defined in this Agreement, unless the context otherwise requires or the competent authorities agree to a common meaning pursuant to the provisions of Article 5, shall have the meaning which it has under the laws of the Contracting State relating to the taxes which are the subject of this Agreement.

Article 4

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange information to administer and enforce the domestic laws of the Contracting States concerning taxes covered by this Agreement, including information to effect the determination, assessment, and collection of tax, the recovery and enforcement of tax claims, or the investigation or prosecution of tax crimes or crimes involving the contravention of tax administration.

2. The competent authorities of the Contracting States shall automatically transmit information to each other for the purposes referred to in paragraph 1. The competent authorities shall determine the items of information to be exchanged pursuant to this paragraph and the procedures to be used to exchange such items of information.

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3. The competent authority of a Contracting State shall spontaneously transmit to the competent authority of the other State information which has come to the attention of the first-mentioned State and which is likely to be relevant to, and bear significantly on, accomplishment of the purposes referred to in paragraph 1. The competent authorities shall determine the information to be exchanged pursuant to this paragraph and take such measures and implement such procedures as are necessary to ensure that the information is forwarded to the competent authority of other State.

4. The competent authority of the requested State shall provide information upon request by the competent authority of the applicant State for the purposes referred to in paragraph 1. If the information available in the tax files of the requested State is not sufficient to enable compliance with the request, that State shall take all relevant measures to provide the applicant State with the information requested.

a) The requested State shall have or has the authority to:

(i) examine any books, papers, records, or other tangible property which may be relevant or material to such inquiry;

(ii) question any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry;

(iii) compel any person having knowledge or in possession, custody or control of information which may be relevant or material to such inquiry

to appear at a stated time and place and testify under oath and produce books, papers, records, or other tangible property;

(iv) take such testimony of any individual under oath.

b) If the United States is requested to obtain the types of information covered by section 3402 of the Right of Financial Privacy Act of 1978 (12 USCA 3402) as in effect at the time of signing this Agreement, it shall obtain the requested information pursuant to that provision. If Mexico is requested to obtain the types of information covered by Article 93 of the Regulatory Law of Banking and Credit Public Service as in effect at the time of signing this Agreement, it shall obtain the requested information pursuant to that provision. Laws or practices of the requested State do not prevent or otherwise affect the authority of the competent authority of the requested State to obtain and provide the the types of information covered by the above-cited provisions pursuant to the Agreement.

c) Privileges under the laws or practices of the applicant State shall not apply in the requested State in the execution of a request. Claims of privilege under the laws or practices of the applicant State shall be determined exclusively by the courts of that State, and claims of privilege under the laws or practices of the requested State shall be determined exclusively by the courts of that State.

5. If information is requested by a Contracting State pursuant to paragraph 4, the requested State shall obtain the information

requested in the same manner, and provide it in the same form, as if the tax of the applicant State were the tax of the requested State and were being imposed by the requested State. However, if specifically requested by the competent authority of the applicant State, the requested State shall:

a) specify the time and place for the taking of testimony or the production of books, papers, records, and other tangible property;

b) place the individual giving testimony or producing books, papers, records and other tangible property under oath;

c) permit the presence of individuals designated by the competent authority of the applicant State as being involved in or affected by execution of the request. The individual giving testimony or the accused may be accompanied by his counsel;

d) provide such individuals described in subparagraph c) with an opportunity to question the individual giving testimony or producing books, papers, records and other tangible property:

(i) if Mexico is the applicant State, directly or through the executing authority; and

ii) if the United States is the applicant State, through the executing authority;

e) secure original and unedited books, papers, and records, and other tangible property;

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f) secure or produce true and correct copies of original and unedited books, papers and records;

g) determine the authenticity of books, papers, records and other tangible property produced;

h) examine the individual producing books, papers, records and other tangible property regarding the purpose for which and the manner in which the item produced is or was maintained;

i) permit the competent authority of the applicant State to provide written questions through the executing authorities of the requested State to which the individual producing books, papers, records and other tangible property is to respond regarding the item produced;

j) perform any other act not in violation of the laws or at variance with the administrative practice of the requested State;

k) certify either that procedures requested by the competent authority of the applicant State were followed or that the procedures requested could not be followed, with an explanation of the deviation and the reason therefor.

6. The provision of the preceding paragraphs shall be construed so as to impose on a Contracting State the obligation to use all legal means and its best efforts to execute a request. A Contracting State may, in its discretion, take measures to obtain and transmit to the other State information which, pursuant to paragraph 3 of Article 1, it has no obligation to transmit.

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7. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to individuals or authorities (including judicial and administrative bodies) involved in the determination, assessment, collection, and administration of, the recovery and collection of claims derived from, the enforcement or prosecution in respect of, or the determination of appeals in respect of, the taxes which are the subject of this Agreement, or the oversight of the above. Such individuals or authorities shall use the information only for such purposes. These individuals or authorities may disclose the information in public court proceedings or in judicial decisions.

Article 5

MUTUAL AGREEMENT PROCEDURE

1. The competent authorities of the contracting States shall agree to implement a program to carry out the purposes of this Agreement. This program may include, in addition to exchanges specified in Article 4, other measures to improve tax compliance, such as exchanges of technical know-how, development of new audit techniques (including simultaneous examinations and simultaneous criminal investigations in their respective jurisdictions and by their respective competent authorities), identification of new areas of non-compliance, and joint studies of non-compliance areas.

2. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Agreement. In particular, the competent authorities may agree to

a common meaning of a term and may determine when costs are extraordinary for purposes of Article 6.

3. The competent authorities of the Contracting States may communicate with each other directly for the purposes of reaching an agreement under this Article.

Article 6

COSTS

Unless the competent authorities of the Contracting States otherwise agree, ordinary costs incurred in providing assistance shall be borne by the requested State and extraordinary costs incurred in providing assistance shall be borne by the applicant State.

Article 7

ENTRY INTO FORCE

This Agreement shall enter into force upon an exchange of notes by the duly authorized representatives of the Contracting States confirming their mutual agreement that both sides have met all constitutional and statutory requirements necessary to effectuate this Agreement.

Article 8

TERMINATION

This Agreement shall remain in force until terminated by one of the Contracting States. Either Contracting State may terminate

the Agreement at any time after the Agreement enters into force provided that at least 3 months prior notice of termination has been given through diplomatic channels.

DONE at Washington, D.C. in duplicate, in the English and Spanish languages, the two texts having equal authenticity, this 9th day of November, 1989

FOR THE UNITED STATES OF AMERICA:	FOR THE UNITED MEXICAN STATES:
s/ illegible	s/illegible

APPENDIX I — TREATY

CONVENTION—AMERICAN REPUBLICS. February 20, 1928.

Convention between the United States of America and other American Republics regarding the status of aliens. Signed at Habana, February 20, 1928, ratification advised by the Senate, with exception of articles 3 and 4, April 16, 1930, ratified by the President, May 7, 1930; ratification of the United States of America deposited with the Pan American Union, May 21, 1930; proclaimed, June 6, 1930.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS, a Convention regarding the status of aliens in their respective territories was adopted in the English, Spanish, Portuguese and French languages at the Sixth International Conference of American States at Habana on February 20, 1928, by the Plenipotentiaries of the United States of America under reservation of its Article 3, and by the respective Plenipotentiaries of Peru, Uruguay, Panama, Ecuador, Mexico, El Salvador, Guatemala, Nicaragua, Bolivia, Venezuela, Colombia, Honduras, Costa Rica, Chile, Brazil, Argentina, Paraguay, Haiti, the Dominican Republic, and Cuba, the English text of which Convention, as contained in the Final Act signed by the Plenipotentiaries of the said States at the closing session of the said Conference, is word for word as follows:

CONVENTION

[STATUS OF ALIENS]

The Governments of the Republics represented at the Sixth

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International Conference of American States, held in the city of Habana, Republic of Cuba, in the year 1928;

Have decided to conclude a convention for the purpose of determining the status of aliens within their respective territories and to that end have appointed the following plenipotentiaries :

Perú: Jesús Melquiades Salazar, Víctor Maúrtua, Enrique Castro Oyanguren, Luis Ernesto Denegri.

Uruguay: Jacobo Varela Acevedo, Juan José Amézaga, Leonel Aguirre, Pedro Erasmo Callorda.

Panamá: Ricardo J. Alfaro, Eduardo Chiari.

Ecuador: Gonzalo Zaldumbide, Víctor Zevallos, Colón Eloy Alfaro.

Mexico: Julio García, Fernando González Roa, Salvador Urbina, Aquiles Elorduy.

Salvador: Gustavo Guerrero, Héctor David Castro, Eduardo Alvarez.

Guatemala: Carlos Salazar, Bernardo Alvarado Tello, Luis Beltranena, José Azurdia.

Nicaragua: Carlos Cuadra Pazos, Joaquín Gómez, Máximo H. Zepeda.

Bolivia : José Antezana, Adolfo Costa du Rels.

Venezuela: Santiago Key Ayala, Francisco Gerardo Yanes, Rafael Angel Arraiz.

Colombia: Enrique Olaya Herrera, Jesús M. Yepes, Roberto Urdaneta Arbeláez, Ricardo Gutiérrez Lee.

Honduras: Fausto Dávila, Mariano Vázquez.

Costa Rica: Ricardo Castro Beeche, J. Rafael Oreamuno, Arturo Tinoco.

Chile: Alejandro Lira, Alejandro Alvarez, Carlos Silva Vildósola, Manuel Bianchi.

Brazil: Raúl Fernandes, Lindolfo Collor, Alarico da Silveira, Sampaio Correa, Eduardo Espínola.

Argentina: Honorio Pueyrredón, (Later resigned), Laurentino Olascoaga, Felipe A. Espil.

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Paraguay: Lisandro Díaz León.

Haiti: Fernando Dennis, Charles Riboul.

Dominican Republic: Francisco J. Peynado, Gustavo A. Díaz, Elías Brache, Angel Morales, Tulio M. Cestero, Ricardo Pérez Alfonseca, Jacinto R. de Castro, Federico C. Alvarez.

United States of America: Charles Evans Hughes, Noble Brandon Judah. Henry P. Fletcher, Oscar W. Underwood, Dwight W. Morrow, Morgan J. O'Brien, James Brown Scott, Ray Lyman Wilbur, Leo S. Rowe.

Cuba: Antonio S. de Bustamante, Orestes Ferrara, Enrique Hernández Cartaya, José Manuel Cortina, Arístides Agüero, José B. Alemán, Manuel Márquez Sterling, Fernando Ortiz, Néstor Carbonell, Jesús Mariá Barraqué.

Who, after depositing their full powers, which were found to be in good and due form, have agreed upon the following provisions:

ARTICLE 1

States have the right to establish by means of laws the conditions under which foreigners may enter and reside in their territory.

ARTICLE 2

Foreigners are subject as are nationals to local jurisdiction and laws, due consideration being given to the limitations expressed in conventions and treaties.

ARTICLE 3

Foreigners may not be obliged to perform military service; but those foreigners who are domiciled, unless they prefer to

leave the country, may be compelled, under the same conditions as nationals, perform police, fire-protection, or militia duty for the protection of the place of their domicile against natural catastrophes or dangers not resulting from war.

ARTICLE 4

Foreigners are obliged to make ordinary or extraordinary contributions, as well as forced loans always provided that such measures apply to the population generally.

ARTICLE 5

States should extend to foreigners, domiciled or in transit through heir territory, all individual guaranties extended to their own nationals, and the enjoyment of essential civil rights without detriment, as regards foreigners, to legal provisions governing the scope of and usages for the exercise of said rights and guaranties.

ARTICLE 6

For reasons of public order or safety, states may expel foreigners domiciled, resident, or merely in transit through their territory.

States are required to receive their nationals expelled from foreign soil who seek to enter their territory.

ARTICLE 7

Foreigners must not mix in political activities, which are the exclusive province of citizens of the country in which they

happen to be; in cases of such interference, they shall be liable to the penalties established by local law.

ARTICLE 8

The present convention does not affect obligations previously undertaken by the contracting parties through international agreements.

ARTICLE 9

After being signed, the present convention shall be submitted to the ratification of the signatory states. The Government of Cuba is charged with transmitting authentic certified copies to the governments for the aforementioned purpose of ratification. The instrument of ratification shall be deposited in the archives of the Pan American Union in Washington, the Union to notify the signatory governments of said deposit. Such notification shall be considered as an exchange of ratifications. This convention shall remain open to the adherence of nonsignatory states.

In witness whereof, the aforenamed plenipotentiaries sign the present convention in Spanish, English, French, and Portuguese, in the city of Habana, the 20th day of February, 1928.

Peru: Jesús M. Salazar, Víctor M. Maúrtua, Luis Ernesto Denegri, E. Castro Oyanguren.

Uruguay: Varela, Pedro Erasmo Callorda.

Panamá: R. J. Alfaro, Eduardo Chiari.

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Ecuador: Gonzalo Zaldumbide, Víctor Zevallos, C. E. Alfaro.

Mexico: Julio García, Fernando González Roa, Salvador Urbina, Aquiles Elorduy.

Salvador: J. Gustavo Guerrero, Héctor David Castro, Ed. Alvarez.

Guatemala: Carlos Salazar, B. Alvarado, Luis Beltranena, J. Azurdia.

Nicaragua: Carlos Cuadra Pazos, Máximo H. Zepeda, Joaquín Gómez.

Bolivia: José Antezana, A. Costa du R.

Venezuela: Santiago Key Ayala, Francisco G. Yanes, Rafael Angel Arraiz.

Colombia: Enrique Olaya Herrera, R. Gutiérrez Lee, J. M. Yepes.

Honduras: F. Dávila, Mariano Vázquez.

Costa Rica: Ricardo Castro Beeche, J. Rafael Oreamuno, A. Tinoco Jiménez.

Chile: Alejandro Lira, Alejandro Alvarez, C. Silva Vildósola, Manuel Bianchi.

Brazil: Raúl Fernandes, Lindolfo Collor.

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Argentina: Laurentino Olascoaga, Felipe A. Espil, Carlos Alberto Alcorta.

Paraguay: Lisandro Díaz León, Juan Vicente Ramírez.

Haiti: Fernando Dennis.

Dominican Republic: Fraco, J. Peynado, Tulio M. Cestero, Jacinto R. de Castro, Elías Brache, R. Pérez Alfonseca.

Reservations of the Delegation of the United States of America

The delegation of the United States of America signs the present convention making express reservation to Article 3 of the same, which refers to military service of foreigners in case of war.

United States of America: Charles Evans Hughes, Noble Brandon Judah, Henry P. Fletcher, Oscar W. Underwood, Morgan J. O'Brien, James Brown Scott, Ray Lyman Wilbur, Leo S. Rowe.

Cuba: Antonio S. de Bustamante, Orestes Ferrara, E. Hernández Cartaya, Arístides de Agüero Bethencourt, M. Márquez Sterling, Néstor Carbonell.

Certified to be the English text of the Convention on Status of Aliens as contained in the Final Act signed at the Closing session of the Sixth International Conference of American States.

Frank B. Kellogg
Secretary of State of the United States of America.

AND WHEREAS, the said Convention, with the exception of Articles 3 and 4 thereof, has been duly ratified on the part of the

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United States of America and the instrument of ratification by the United States of America was deposited with the Pan American Union on May 21, 1930;

AND WHEREAS, the said Convention has been ratified also by the Governments of Panama, Brazil and Nicaragua, and the instruments of ratification of the said Governments were deposited with the Pan American Union on May 21, 1929, September 3, 1929, and March 20, 1930, respectively;

NOW, THEREFORE, be it known that I, Herbert Hoover, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof, with the exception of Articles 3 and 4, may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this sixth day of June in the year of our Lord one thousand nine hundred and thirty, and of the Independence of the United [seal] States of America the one hundred and fifty-fourth.

HERBERT HOOVER

By the President:
Henry L. Stimson
Secretary of State.

APPENDIX J — STATUTORY PROVISIONS

26 U.S.C. § 7602

§ 7602. Examination of books and witnesses

(a) Authority to summon, etc. — For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense. — The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

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(c) No administrative summons when there is Justice Department referral.—

(1) Limitation of authority. — No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

(2) Justice Department referral in effect. — For purposes of this subsection —

(A) In general. — A Justice Department referral is in effect with respect to any person if —

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination. — A Justice Department referral shall cease to be in effect with respect to a person when —

(i) the Attorney General notifies the Secretary, in writing, that —

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation,

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

(3) **Taxable years, etc., treated separately.** — For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(Aug. 16, 1954, c. 736, 68A Stat. 901; Oct. 4, 1976, Pub.L. 94-455, Title XIX, § 1906(b) (13) (A), 90 Stat. 1834; Sept. 3, 1982, Pub.L. 97-248, Title III, § 333(a), 96 Stat. 622.)

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26 U.S.C. § 7609

§ 7609. Special procedures for third-party summonses

(a) Notice. —

(1) In general. — If —

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

(2) Sufficiency of notice. — Such notice shall be sufficient if, on or before such third day, such notice is served in the manner provided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or registered mail to the last known address of such person, or, in the absence of a last known address, is left with

the person summoned. If such notice is mailed, it shall be sufficient if mailed to the last known address of the person entitled to notice or, in the case of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, to the last known address of the fiduciary of such person, even if such person or fiduciary is then deceased, under a legal disability, or no longer in existence.

(3) Third-party recordkeeper defined. — For purposes of this subsection, the term "third-party recordkeeper" means —

(A) any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), or any credit union (within the meaning of section 501(c)(14)(A));

(B) any consumer reporting agency (as defined under section 603(d) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f)));

(C) any person extending credit through the use of credit cards or similar devices;

(D) any broker (as defined in section 3(a)(4) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)));

(E) any attorney;

(F) any accountant;

(G) any barter exchange (as defined in section 6045(c)(3)); and

(H) any regulated investment company (as defined in section 851) and any agent of such regulated investment company when acting as an agent thereof.

(4) Exceptions. — Paragraph (1) shall not apply to any summons —

(A) served on the person with respect to whose liability the summons is issued, or any officer or employee of such person,

(B) to determine whether or not records of the business transactions or affairs of an identified person have been made or kept, or

(C) described in subsection (f).

(5) Nature of summons. — Any summons to which this subsection applies (and any summons in aid of collection described in subsection (c)(2)(B)) shall identify the taxpayer to whom the summons relates or the other person to whom the records pertain and shall provide such other information as will enable the person summoned to locate the records required under the summons.

(b) Right to intervene; right to proceeding to quash. —

(1) Intervention. — Notwithstanding any other law or rule

of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Proceedings to quash.—

(A) In general. — Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

(B) Requirement of notice to person summoned and to Secretary. — If any person begins a proceeding under subparagraph (A) with respect to any summons, not later than the close of the 20-day period referred to in subparagraph (A) such person shall mail by registered or certified mail a copy of the petition to the person summoned and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

(C) Intervention; etc. — Notwithstanding any other law or rule of law, the person summoned shall have the right to intervene in any proceeding under subparagraph (A). Such person shall be bound by the decision in such proceeding (whether or not the person intervenes in such proceeding).

(c) Summons to which section applies.—

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(1) In general. — Except as provided in paragraph (2), a summons is described in this subsection if it is issued under paragraph (2) of section 7602(a) or under section 6420(e)(2), 6421(g)(2), or 6427(j)(2) and requires the production of records.

(2) Exceptions. — A summons shall not be treated as described in this subsection if —

(A) it is solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in subsection (a)(3)(A), or

(B) it is in aid of the collection of —

(i) the liability of any person against whom an assessment has been made or judgment rendered, or

(ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

(3) Records; certain related testimony. — For purposes of this section —

(A) the term "records" includes books, papers, or other data, and

(B) a summons requiring the giving of testimony relating to records shall be treated as a summons requiring the production of such records.

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(d) Restriction on examination of records. — No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made —

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

(e) Suspension of statute of limitations. —

(1) Subsection (b) action. — If any person takes any action as provided in subsection (b) and such person is the person with respect to whose liability the summons is issued (or is the agent, nominee, or other person acting under the direction or control of such person), then the running of any period of limitations under section 6501 (relating to the assessment and collection of tax) or under section 6531 (relating to criminal prosecutions) with respect to such person shall be suspended for the period during which a proceeding, and appeals therein, with respect to the enforcement of such summons is pending.

(2) Suspension after 6 months of service of summons. — In the absence of the resolution of the third-party recordkeeper's response to the summons described in

subsection (c), or the summoned party's response to a summons described in subsection (f), the running of any period of limitations under section 6501 or under section 6531 with respect to any person with respect to whose liability the summons is issued (other than a person taking action as provided in subsection (b)) shall be suspended for the period —

(A) beginning on the date which is 6 months after the service of such summons, and

(B) ending with the final resolution of such response.

(f) Additional requirement in the case of a John Doe summons. — Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that —

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

(g) Special exception for certain summonses. — In the case of any summons described in subsection (c), the provisions of subsections (a)(1) and (b) shall not apply if, upon petition by the Secretary, the court determines, on the basis of the facts and circumstances alleged, that there is reasonable cause to believe the giving of notice may lead to attempts to conceal, destroy, or alter records relevant to the examination, to prevent the communication of information from other persons through intimidation, bribery, or collusion, or to flee to avoid prosecution, testifying, or production or records.

(h) Jurisdiction of district court; etc. —

(1) Jurisdiction. — The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b)(2), (f), or (g). An order denying the petition shall be deemed a final order which must be appealed.

(2) Special rule for proceedings under subsections and (f) and (g). — The determinations required to be made under subsections (f) and (g) shall be made ex parte and shall be made solely on the petition and supporting affidavits.

(i) Duty of third-party recordkeeper and summoned party. —

(1) Recordkeeper must assemble records and be prepared to produce records. — On receipt of a summons described in subsection (c), the third-party recordkeeper shall proceed to assemble the records requested, or such portion thereof as the Secretary may prescribe, and shall be

prepared to produce the records pursuant to the summons on the day on which the records are to be examined.

(2) Secretary may give recordkeeper certificate. — The Secretary may issue a certificate to the third-party recordkeeper that the period prescribed for beginning a proceeding to quash a summons has expired and that no such proceeding began within such period, or that the taxpayer consents to the examination.

(3) Protection for recordkeeper who discloses. — Any third-party recordkeeper, or agent or employee thereof, making a disclosure of records pursuant to this section in good-faith reliance on the certificate of the Secretary or an order of a court requiring production of records shall not be liable to any customer or other person for such disclosure.

(4) Notice of suspension of statute of limitations in the case of a John Doe summons. — In the case of a summons described in subsection (f) with respect to which any period of limitations has been suspended under subsection (e)(2), the summoned party shall provide notice of such suspension to any person described in subsection (f).

(Added Pub.L. 94-455, Title XII, § 1205(a), Oct. 4, 1976, 90 Stat. 1699, and amended Pub.L. 95-599, Title V, § 505(c) (6), Nov. 6, 1978, 92 Stat. 2760; Pub.L. 95-600, Title VII, § 703(*I*) (4), Nov. 6, 1978, 92 Stat. 2943; Pub.L.96-223, Title II, § 232(d) (4) (E), Apr. 2, 1980, 94 Stat. 278; Pub.L. 97-248, Title III, §§ 311(b), 331(a)-(d), 332(a), Sept. 3, 1982, 96 Stat. 601, 620, 621; Pub.L. 97-424, Title V, § 515(b)(12), Jan. 6, 1983, 96 Stat. 2182; Pub.L. 98-369, Div. A, Title VII, § 714(i), Title IX, § 911(d)(2)(G), July 18, 1984, 98 Stat. 962, 1007; Pub.L. 98-620, Title IV, § 402(28)(D), Nov. 8,

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1984, 98 Stat. 3359; Pub.L. 99-514, Title VI, § 656(a), Title XV, § 1561(a), (b), Title XVII, § 1703(e)(2)(G), Oct. 22, 1986, 100 Stat. 2299, 2761, 2778, as amended Pub.L. 100-647, Title I, § 1017(c)(12), Nov. 10, 1988, 102 Stat. 3577; Pub.L. 100-646, Title I, §§ 1015(*l*)(1), (2), 1017(c)(9), Nov. 10, 1988, 102 Stat. 3571, 3572, 3576.)

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26 U.S.C. § 274

§ 274. Disallowance of certain entertainment, etc., expenses

(a) Entertainment, amusement, or recreation. —

(1) In general. — No deduction otherwise allowable under this chapter shall be allowed for any item —

(A) Activity. — With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item was associated with the active conduct of the taxpayer's trade or business, or

(B) Facility. — With respect to a facility used in connection with an activity referred to in subparagraph (A).

In the case of an item described in subparagraph (A), the deduction shall in no event exceed the portion of such item which meets the requirements of subparagraph (A).

(2) Special rules. — For purposes of applying paragraph (1) —

(A) Dues or fees to any social, athletic, or sporting club or organization shall be treated as items with respect to facilities.

(B) An activity described in section 212 shall be treated as a trade or business.

(C) In the case of a club, paragraph (1)(B) shall apply unless the taxpayer establishes that the facility was used primarily for the furtherance of the taxpayer's trade or business and that the item was directly related to the active conduct of such trade or business.

(3) Denial of deduction for club dues. — Notwithstanding the preceding provisions of this subsection, no deduction shall be allowed under this chapter for amounts paid or incurred for membership in any club organized for business, pleasure, recreation, or other social purpose.

(b) Gifts. —

(1) Limitation. — No deduction shall be allowed under section 162 or section 212 for any expense for gifts made directly or indirectly to any individual to the extent that such expense, when added to prior expenses of the taxpayer for gifts made to such individual during the same taxable year, exceeds $25. For purposes of this section, the term "gift" means any item excludable from gross income of the recipient under section 102 which is not excludable from his gross income under any other provision of this chapter, but such term does not include —

(A) an item having a cost to the taxpayer not in excess of $4.00 on which the name of the taxpayer is clearly and permanently imprinted and which is one of a number of identical items distributed generally by the taxpayer, or

(B) a sign, display rack, or other promotional material to be used on the business premises of the recipient.

(2) **Special rules.** —

(A) In the case of a gift by a partnership, the limitation contained in paragraph (1) shall apply to the partnership as well as to each member thereof.

(B) For purposes of paragraph (1), a husband and wife shall be treated as one taxpayer.

(c) **Certain foreign travel.** —

(1) **In general.** — In the case of any individual who travels outside the United States away from home in pursuit of a trade or business or in pursuit of an activity described in section 212, no deduction shall be allowed under section 162 or section 212 for that portion of the expenses of such travel otherwise allowable under such section which, under regulations prescribed by the Secretary, is not allocable to such trade or business or to such activity.

(2) **Exception.** — Paragraph (1) shall not apply to the expenses of any travel outside the United States away from home if —

(A) such travel does not exceed one week or

(B) the portion of the time of travel outside the United States away from home which is not attributable to the pursuit of the taxpayer's trade or business or an

activity described in section 212 is less than 25 percent of the total time on such travel.

(3) Domestic travel excluded. — For purposes of this subsection, travel outside the United States does not include any travel from one point in the United States to another point in the United States.

(d) Substantiation required. — No deduction or credit shall be allowed —

(1) under section 162 or 212 for any traveling expense (including meals and lodging while away from home),

(2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity,

(3) for any expense for gifts, or

(4) with respect to any listed property (as defined in section 280F(d)(4)), unless the taxpayer substantiates by adequate records or by sufficient evidence corroborating the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility or property, or the date and description of the gift, (C) the business purpose of the expense or other item, and (D) the business relationship to the taxpayer of persons entertained, using the facility or property, or receiving the gift. The Secretary may by regulations provide that some or all of the requirements of the preceding sentence shall not apply in the

case of an expense which does not exceed an amount prescribed pursuant to such regulations. This subsection shall not apply to any qualified nonpersonal use vehicle (as defined in subsection (i)).

(e) Specific exceptions to application of subsection (a). — Subsection (a) shall not apply to —

(1) Food and beverages for employees. — Expenses for food and beverages (and facilities used in connection therewith) furnished on the business premises of the taxpayer primarily for his employees.

(2) Expenses treated as compensation. — Expenses for goods, services, and facilities, to the extent that the expenses are treated by the taxpayer, with respect to the recipient of the entertainment, amusement, or recreation, as compensation to an employee on the taxpayer's return of tax under this chapter and as wages to such employee for purposes of chapter 24 (relating to withholding of income tax at source on wages).

(3) Reimbursed expenses. — Expenses paid or incurred by the taxpayer, in connection with the performance by him of services for another person (whether or not such other person is his employer), under a reimbursement or other expense allowance arrangement with such other person, but this paragraph shall apply —

(A) where the services are performed for an employer, only if the employer has not treated such expenses in the manner provided in paragraph (2), or

(B) where the services are performed for a person other than an employer, only if the taxpayer accounts (to the extent provided by subsection (d)) to such person.

(4) Recreational, etc., expenses for employees. — Expenses for recreational, social, or similar activities (including facilities therefor) primarily for the benefit of employees (other than employees who are highly compensated employees (within the meaning of section 414(q))). For purposes of this paragraph, an individual owning less than a 10-percent interest in the taxpayer's trade or business shall not be considered a shareholder or other owner, and for such purposes an individual shall be treated as owning any interest owned by a member of his family (within the meaning of section 267(e)(4)). This paragraph shall not apply for purposes of subsection (a)(3).

(5) Employees, stockholder, etc., business meetings. — Expenses incurred by a taxpayer which are directly related to business meetings of his employees, stockholders, agents, or directors.

(6) Meetings of business leagues, etc. — Expenses directly related and necessary to attendance at a business meeting or convention of any organization described in section 501(c)(6) (relating to business leagues, chambers of commerce, real estate boards, and boards of trade) and exempt from taxation under section 501(a).

(7) Items available to public. — Expenses for goods, services, and facilities made available by the taxpayer to the general public.

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(8) Entertainment sold to customers. — Expenses for goods or services (including the use of facilities) which are sold by the taxpayer in a bona fide transaction for an adequate and full consideration in money or money's worth.

(9) Expenses includible in income of persons who are not employees. — Expenses paid or incurred by the taxpayer for goods, services, and facilities to the extent that the expenses are includible in the gross income of a recipient of the entertainment, amusement, or recreation who is not an employee of the taxpayer as compensation for services rendered or as a prize or award under section 74. The preceding sentence shall not apply to any amount paid or incurred by the taxpayer if such amount is required to be included (or would be so required except that the amount is less than $600) in any information return filed by such taxpayer under part III of subchapter A of chapter 61 and is not so included.

For purposes of this subsection, any item referred to in subsection (a) shall be treated as an expense.

(f) Interest, taxes, casualty losses, etc. — This section shall not apply to any deduction allowable to the taxpayer without regard to its connection with his trade or business (or with his income-producing activity). In the case of a taxpayer which is not an individual, the preceding sentence shall be applied as if it were an individual.

(g) Treatment of entertainment, etc., type facility. — For purposes of this chapter, if deductions are disallowed under subsection (a) with respect to any portion of a facility, such portion shall be treated as an asset which is used for personal,

living, and family purposes (and not as an asset used in the trade or business).

(h) Attendance at conventions, etc. —

(1) In general. — In the case of any individual who attends a convention, seminar, or similar meeting which is held outside the North American area, no deduction shall be allowed under section 162 for expenses allocable to such meeting unless the taxpayer establishes that the meeting is directly related to the active conduct of his trade or business and that, after taking into account in the manner provided by regulations prescribed by the Secretary —

(A) the purpose of such meeting and the activities taking place at such meeting,

(B) the purposes and activities of the sponsoring organizations or groups,

(C) the residences of the active members of the sponsoring organization and the places at which other meetings of the sponsoring organization or groups have been held or will be held, and

(D) such other relevant factors as the taxpayers may present,

it is as reasonable for the meeting to be held outside the North American area as within the North American area.

(2) Conventions on cruise ships. — In the case of any individual who attends a convention, seminar, or other

meeting which is held on any cruise ship, no deduction shall be allowed under section 162 for expenses allocable to such meeting, unless the taxpayer meets the requirements of paragraph (5) and establishes that the meeting is directly related to the active conduct of his trade or business and that —

(A) the cruise ship is a vessel registered in the United States; and

(B) all ports of call of such cruise ship are located in the United States or in possessions of the United States.

With respect to cruises beginning in any calendar year, not more than $2,000 of the expenses attributable to an individual attending one or more meetings may be taken into account under section 162 by reason of the preceding sentence.

(3) **Definitions.** — For purposes of this subsection —

(A) North American area. — The term "North American area" means the United States, its possessions, and the Trust Territory of the Pacific Islands, and Canada and Mexico.

(B) Cruise ship. — The term "cruise ship" means any vessel sailing within or without the territorial waters of the United States.

(4) Subsection to apply to employer as well as to traveler. —

(A) Except as provided in subparagraph (B), this subsection shall apply to deductions otherwise allowable under section 162 to any person, whether or not such person is the individual attending the convention, seminar, or similar meeting.

(B) This subsection shall not deny a deduction to any person other than the individual attending the convention, seminar, or similar meeting with respect to any amount paid by such person to or on behalf of each individual if includible in the gross income of such individual. The preceding sentence shall not apply if the amount is required to be included in any information return filed by such person under part III of subchapter A of chapter 61 and is not so included.

(5) **Reporting requirements.** — No deduction shall be allowed under section 162 for expenses allocable to attendance at a convention, seminar, or similar meeting on any cruise ship unless the taxpayer claiming the deduction attaches to the return of tax on which the deduction is claimed —

(A) a written statement signed by the individual attending the meeting which includes —

(i) information with respect to the total days of the trip, excluding the days of transportation to and from the cruise ship port, and the number of hours of each day of the trip which such individual devoted to scheduled business activities,

(ii) a program of the scheduled business activities of the meeting, and

(iii) such other information as may be required in regulations prescribed by the Secretary; and

(B) a written statement signed by an officer of the organization or group sponsoring the meeting which includes —

(i) a schedule of the business activities of each day of the meeting,

(ii) the number of hours which the individual attending the meeting attended such scheduled business activities, and

(iii) such other information as may be required in regulations prescribed by the Secretary.

(6) Treatment of conventions in certain Caribbean countries.—

(A) In general. — For purposes of this subsection, the term "North American area" includes, with respect to any convention, seminar, or similar meeting, any beneficiary country if (as of the time such meeting begins) —

(i) there is in effect a bilateral or multilateral agreement described in subparagraph (C) between such country and the United States providing for the exchange of information between the United States and such country, and

(ii) there is not in effect a finding by the Secretary that the tax laws of such country discriminate against conventions held in the United States.

(B) Beneficiary country. — For purposes of this paragraph, the term "beneficiary country" has the meaning given to such term by section 212(a)(1)(A) of the Caribbean Basin Economic Recovery Act; except that such term shall include Bermuda.

(C) Authority to conclude exchange of information agreements. —

(i) In general. — The Secretary is authorized to negotiate and conclude an agreement for the exchange of information with any beneficiary country. Except as provided in clause (ii), an exchange of information agreement shall provide for the exchange of such information (not limited to information concerning nationals or residents of the United States or the beneficiary country) as may be necessary or appropriate to carry out and enforce the tax laws of the United States and the beneficiary country (whether criminal or civil proceedings), including information which may otherwise be subject to nondisclosure provisions of the local law of the beneficiary country such as provisions respecting bank secrecy and bearer shares. The exchange of information agreement shall be terminable by either country on reasonable notice and shall provide that information received by either country will be disclosed only to persons or authorities (including courts and administrative

bodies) involved in the administration or oversight of, or in the determination of appeals in respect of, taxes of the United States or the beneficiary country and will be used by such persons or authorities only for such purposes.

(ii) Nondisclosure of qualified confidential information sought for civil tax purposes. — An exchange of information agreement need not provide for the exchange of qualified confidential information which is sought only for civil tax purposes if —

(I) the Secretary of the Treasury, after making all reasonable efforts to negotiate an agreement which includes the exchange of such information, determines that such an agreement cannot be negotiated but that the agreement which was negotiated will significantly assist in the administration and enforcement of the tax laws of the United States, and

(II) the President determines that the agreement as negotiated is in the national security interest of the United States.

(iii) Qualified confidential information defined. — For purposes of this subparagraph, the term "qualified confidential information" means information which is subject to the nondisclosure provisions of any local law of the beneficiary country regarding bank secrecy or ownership of bearer shares.

(iv) Civil tax purposes. — For purposes of this subparagraph, the determination of whether information is sought only for civil tax purposes shall be made by the requesting party.

(D) Coordination with other provisions. — Any exchange of information agreement negotiated under subparagraph (C) shall be treated as an income tax convention for purposes of section 6108(k)(4). The Secretary may exercise his authority under subchapter A of chapter 78 to carry out any obligation of the United States under an agreement referred to in subparagraph (C).

(E) Determinations published in the Federal Register. — The following shall be published in the Federal Register —

(i) any determination by the President under subparagraph (C)(ii) (including the reasons for such determination),

(ii) any determination by the Secretary under subparagraph (C)(ii) (including the reasons for such determination), and

(iii) any finding by the Secretary under subparagraph (A)(ii) (and any termination thereof).

(7) Seminars, etc. for section 212 purposes. — No deduction shall be allowed under section 212 for expenses allocable to a convention, seminar, or similar meeting.

(i) Qualified nonpersonal use vehicle. — For purposes of subsection (d), the term "qualified nonpersonal use vehicle" means any vehicle which, by reason of its nature, is not likely to be used more than a de minimis amount for personal purposes.

(j) Employee achievement awards. —

(1) General rule. — No deduction shall be allowed under section 162 or section 212 for the cost of an employee achievement award except to the extent that such cost does not exceed the deduction limitations of paragraph (2).

(2) Deduction limitations. — The deduction for the cost of an employee achievement award made by an employer to an employee —

(A) which is not qualified plan award, when added to the cost to the employer for all other employee achievement awards made to such employee during the taxable year which are not qualified plan awards, shall not exceed $400, and

(B) which is a qualified plan award, when added to the cost to the employer for all other employee achievement awards made to such employee during the taxable year (including employee achievement awards which are not qualified plan awards), shall not exceed $1,000.

(3) Definitions. — For purposes of this subsection —

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(A) Employee achievement award. — The term "employee achievement award" means an item of tangible personal property which is —

(i) transferred by an employer to an employee for length of service achievement or safety achievement,

(ii) awarded as part of a meaningful presentation, and

(iii) awarded under conditions and circumstances that do not create a significant likelihood of the payment of disguised compensation.

(B) Qualified plan award. —

(i) In general. — The term "qualified plan award" means an employee achievement award awarded as part of an established written plan or program of the taxpayer which does not discriminate in favor of highly compensated employees (within the meaning of section 414(q)) as to eligibility or benefits.

(ii) Limitation. — An employee achievement award shall not be treated as a qualified plan award for any taxable year if the average cost of all employee achievement awards which are provided by the employer during the year, and which would be qualified plan awards but for this subparagraph, exceeds $400. For purposes of the

preceding sentence, average cost shall be determined by including the entire cost of qualified plan awards, without taking into account employee achievement awards of nominal value.

(4) **Special rules.** — For purposes of this subsection —

(A) **Partnerships.** — In the case of an employee achievement award made by a partnership, the deduction limitations contained in paragraph (2) shall apply to the partnership as well as to each member thereof.

(B) **Length of service awards.** — An item shall not be treated as having been provided for length of service achievement if the item is received during the recipient's 1st 5 years of employment or if the recipient received a length of service achievement award (other than an award excludable under section 132(e)(1)) during that year or any of the prior 4 years.

(C) **Safety achievement awards.** — An item provided by an employer to an employee shall not be treated as having been provided for safety achievement if —

(i) during the taxable year, employee achievement awards (other than awards excludable under section 132(e)(1)) for safety achievement have previously been awarded by the employer to more than 10 percent of the employees of the employer (excluding employees described in clause (ii)), or

(ii) such item is awarded to a manager, administrator, clerical employee, or other professional employee.

(k) **Business meals.** —

(1) **In general.** — No deduction shall be allowed under this chapter for the expense of any food or beverages unless —

(A) such expense is not lavish or extravagant under the circumstances, and

(B) the taxpayer (or an employee of the taxpayer) is present at the furnishing of such food or beverages.

(2) **Exceptions.** — Paragraph (1) shall not apply to —

(A) any expense described in paragraph (2), (3), (4), (7), (8), or (9) of subsection (e), and

(B) any other expense to the extent provided in regulations.

(*l*) **Additional limitations on entertainment tickets.** —

(I) **Entertainment tickets.** —

(A) **In general.** — In determining the amount allowable as a deduction under this chapter for any ticket for any activity or facility described in subsection (d)(2), the amount taken into account shall not exceed the face value of such ticket.

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(B) Exception for certain charitable sports events. — Subparagraph (A) shall not apply to any ticket for any sports event —

(i) which is organized for the primary purpose of benefiting an organization which is described in section 501(c)(3) and exempt from tax under section 501(a),

(ii) all of the net proceeds of which are contributed to such organization, and

(iii) which utilizes volunteers for substantially all of the work performed in carrying out such event.

(2) Skyboxes, etc. — In the case of a skybox or other private luxury box leased for more than 1 event, the amount allowable as a deduction under this chapter with respect to such events shall not exceed the sum of the face value of non-luxury box seat tickets for the seats in such box covered by the lease. For purposes of the preceding sentence, 2 or more related leases shall be treated as 1 lease.

(m) Additional limitations on travel expenses. —

(1) Luxury water transportation. —

(A) In general. — No deduction shall be allowed under this chapter for expenses incurred for transportation by water to the extent such expenses exceed twice the aggregate per diem amounts for

days of such transportation. For purposes of the preceding sentence, the term "per diem amounts" means the highest amount generally allowable with respect to a day to employees of the executive branch of the Federal Government for per diem while away from home but serving in the United States.

(B) Exceptions. — Subparagraph (A) shall not apply to —

(i) any expense allocable to a convention, seminar, or other meeting which is held on any cruise ship, and

(ii) any expense described in paragraph (2), (3), (4), (7), (8), or (9) of subsection (e).

(2) Travel as form of education. — No deduction shall be allowed under this chapter for expenses for travel as a form of education.

(3) Travel expenses of spouse, dependent, or others. — No deduction shall be allowed under this chapter (other than section 217) for travel expenses paid or incurred with respect to a spouse, dependent, or other individual accompanying the taxpayer or an officer or employee of the taxpayer) on business travel, unless —

(A) the spouse, dependent, or other individual is an employee of the taxpayer,

(B) the travel of the spouse, dependent, or other individual is for a bona fide business purpose, and

(C) such expenses would otherwise be deductible by the spouse, dependent, or other individual.

(n) Only 50 percent of meal and entertainment expenses allowed as deduction. —

(1) In general. — The amount allowable as a deduction under this chapter for —

(A) any expense for food or beverages, and

(B) any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such activity,

shall not exceed 50 percent of the amount of such expense or item which would (but for this paragraph) be allowable as a deduction under this chapter.

(2) Exceptions. — Paragraph (1) shall not apply to any expense if —

(A) such expense is described in paragraph (2), (3), (4), (7), (8), or (9) of subsection (e),

(B) in the case of an expense for food or beverages, such expense is excludable from the gross income of the recipient under section 132 by reason of subsection (e) thereof (relating to de minimis fringes),

(C) such expense is covered by a package involving a ticket described in subsection (*l*)(1)(B),

(D) in the case of an employer who pays or reimburses moving expenses of an employee, such expenses are includible in the income of the employee under section 82, or

(E) such expense if for food or beverages —

(i) required by any Federal law to be provided to crew members of a commercial vessel,

(ii) provided to crew members of a commercial vessel —

(I) which is operating on the Great Lakes, the Saint Lawrence Seaway, or any inland waterway of the United States, and

(II) which is of a kind which would be required by Federal law to provide food and beverages to crew members if it were operated at sea,

(iii) provided on an oil or gas platform or drilling rig if the platform or rig is located offshore, or

(iv) provided on an oil or gas platform or drilling rig, or at a support camp which is in proximity and integral to such platform or rig, if the platform or rig is located in the United States north of 54 degrees north latitude.

Clauses (i) and (ii) of subparagraph (E) shall not apply to vessels primarily engaged in providing luxury water transportation (determined under the principles of subsection (m)). In the case of the employee, the exception of subparagraph (A) shall not apply to expenses described in subparagraph (D).

[(3) **Repealed.** Pub.L. 101-508, Title XI, § 11802(b)(2)(B), Nov. 5, 1990, 104 Stat. 1388-529]

(o) **Regulatory authority.** — The Secretary shall prescribe such regulations as he may deem necessary to carry out the purposes of this section, including regulations prescribing whether subsection (a) or subsection (b) applies in cases where both such subsections would otherwise apply.

(Added Pub.L. 87-834, § 4(a)(1), Oct. 16, 1962, 76 Stat. 974, and amended Pub.L. 88-272, Title II, § 217(a), Feb. 26, 1964, 78 Stat. 56; Pub.L. 94-455, Title VI, § 602(a), Title XIX, § 1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1572, 1834; Pub.L. 95-600, Title III, § 361(a), (b), Title VII, § 701(g)(1)-(3), Nov. 6, 1978, 92 Stat. 2847, 2903, 2904; Pub.L. 95-600, Title III, § 361(b); Pub.L. 96-222, Title I, § 108(a)(10)(B), Apr. 1, 1980, 94 Stat. 212; Pub.L. 96-222, Title I, § 103(a)(10)(A), Apr. 1, 1980, 94 Stat. 212; Pub.L. 96-598, § 5(a), Dec. 24, 1980, 94 Stat. 3488; Pub.L. 96-605, Title I, § 108(a), Dec. 28, 1980, 94 Stat. 3524; Pub.L. 96-6008, § 4(a), Dec. 28, 1980, 94 Stat. 3552; Pub.L. 97-34, Title II, § 265(a), (b), Aug. 13, 1981, 95 Stat. 265; Pub.L. 97-248, Title III, §§ 307(a)(1), 308(a), Sept. 3, 1982, 96 Stat. 589, 591; Pub.L. 97-424, Title V, § 543(a), Jan. 6, 1983, 96 Stat. 2195; Pub.L. 98-67, Title I, § 102(a), Title II, § 222(a), Aug. 5, 1983, 97 Stat. 369, 395; Pub.L. 98-369, Div. A, Title I, § 179(b)(1), Title VIII, § 801(c), July 18, 1984, 98 Stat. 718, 995; Pub.L. 99-

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44, §§ 1(a), 2, 6(b), May 24, 1985, 99 Stat. 77, 79; Pub.L. 99-514, Title I, §§ 122(c), (d), 142(a)-(c), Title XI, § 1114(b)(6), Oct. 22, 1986, 100 Stat. 2110, 2117, 2118, 2120, 2451; Pub.L. 100-647, Title I, § 1001(g)(1)-(3), (4)(A), (5), Title VI, § 6003(a), Nov. 10, 1988, 102 Stat. 3351, 3352, 3684; Pub.L. 101-239, Title VII, §§ 7816(a), 7841(d)(18), Dec. 19, 1989, 103 Stat. 2420, 2429; Pub.L. 101-508, Title XI, § 11802(b), Nov. 5, 1990, 104 Stat. 1388-529; Pub.L. 103-66, Title XIII, §§ 13209(a), (b), 13210(a), (b), 13272(a), Aug. 10, 1993, 107 Stat. 469, 542.)

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26 U.S.C. § 927

§ 927. Other definitions and special rules

(a) Export property. — For purposes of this subpart—

(1) In general. — The term "export property" means property —

(A) manufactured, produced, grown, or extracted in the United States by a person other than a FSC,

(B) held primarily for sale, lease, or rental, in the ordinary course of trade or business, by, or to, a FSC, for direct use, consumption, or disposition outside the United States, and

(C) not more than 50 percent of the fair market value of which is attributable to articles imported into the United States.

For purposes of subparagraph (C), the fair market value of any article imported into the United States shall be its appraised value, as determined by the Secretary under section 402 of the Tariff Act of 1930 (19 U.S.C. 1401a) in connection with its importation.

(2) Excluded property. — The term "export property" shall not include —

(A) property leased or rented by a FSC for use by any member of a controlled group of corporations of which such FSC is a member,

(B) patents, inventions, models, designs, formulas, or processes whether or not patented, copyrights (other than films, tapes, records, or similar reproductions, for commercial or home use), good will, trademarks, trade brands, franchises, or other like property,

(C) oil or gas (or any primary product thereof),

(D) products the export of which is prohibited or curtailed to effectuate the policy set forth in paragraph (2)(C) of section 3 of the Export Administration Act of 1979 (relating to the protection of the domestic economy), or

(E) any unprocessed timber which is a softwood.

For purposes of subparagraph (E), the term "unprocessed timber" means any log, cant, or similar form of timber.

(3) **Property in short supply.** — If the President determines that the supply of any property described in paragraph (1) is insufficient to meet the requirements of the domestic economy, he may by Executive order designate the property as in short supply. Any property so designated shall not be treated as export property during the period beginning with the date specified in the Executive order and ending with the date specified in an Executive order setting forth the President's determination that the property is no longer in short supply.

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(4) Qualified cooperative. — The term "qualified cooperative" means any organization to which part I of subchapter T applies which is engaged in the marketing of agricultural or horticultural products.

(b) Gross receipts. —

(1) In general. — for purposes of this subpart, the term "gross receipts" means —

(A) the total receipts from the sale, lease, or rental of property held primarily for sale, lease, or rental in the ordinary course of trade or business, and

(B) gross income from all other sources.

(2) Gross receipts taken into account in case of commissions. — In the case of commissions on the sale, lease, or rental of property, the amount taken into account for purposes of this subpart as gross receipts shall be the gross receipts on the sale, lease, or rental of the property on which such commissions arose.

(c) Investment income. — for purposes of this subpart, the term "investment income" means —

(1) dividends,

(2) interest,

(3) royalties,

(4) annuities,

(5) rents (other than rents from the lease or rental of export property for use by the lessee outside of the United States),

(6) gains from the sale or exchange of stock or securities,

(7) gains from the futures transactions in any commodity on, or subject to the rules of, a board of trade or commodity exchange (other than gains which arise out of a bona fide hedging transaction reasonably necessary to conduct the business of the FSC in the manner in which such business is customarily conducted by others),

(8) amounts includible in computing the taxable income of the corporation under part I of subchapter J, and

(9) gains from the sale or other disposition of any interest in an estate or trust.

(d) **Other definitions.** — for purposes of this subpart —

(1) **Carrying charges.** — The term "carrying charges" means —

(A) carrying charges, and

(B) under regulations prescribed by the Secretary, any amount in excess of the price for an immediate cash sale and any other unstated interest.

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(2) Transaction.—

(A) In general. — The term "transaction" means —

(i) any sale, exchange, or other disposition,

(ii) any lease or rental, and

(iii) any furnishing of services.

(B) grouping of transactions. — To the extent provided in regulations, any provision of this subpart which, but for this subparagraph, would be applied on a transaction-by-transaction basis may be applied by the taxpayer on the basis of groups of transactions based on product lines or recognized industry or trade usage. Such regulations may permit different groupings for different purposes.

(3) United States defined. — The term "United States" includes the Commonwealth of Puerto Rico.

(4) Controlled group of corporations. — The term "controlled group of corporations" has the meaning given to such term by section 1563(a), except that —

(A) "more than 50 percent" shall be substituted for "at least 80 percent" each place it appears therein, and

(B) section 1563(b) shall not apply.

(5) Possessions. — The term "possession of the United

States" means Guam, American Samos, the Commonwealth of the Northern Mariana Islands, and the Virgin Islands of the United States.

(6) Section 923(a)(2) non-exempt income. — The term "section 923(a)(2) non-exempt income" means any foreign trade income from a transaction with respect to which paragraph (1) or (2) of section 925(a) does not apply and which is not exempt foreign trade income. Such term shall not include any income which is effectively connected with the conduct of a trade or business within the United States (determined without regard to this subpart).

(e) Special rules.—

(1) Source rules for related persons. — Under regulations, the income of a person described in section 482 from a transaction giving rise to foreign trading gross receipts of a FSC which is treated as from sources outside the United States shall not exceed the amount which would be treated as foreign source income earned by such person if the pricing rule under section 994 which corresponds to the rule used under section 925 with respect to such transaction applied to such transaction.

(2) Participation in international boycotts, etc. — Under regulations prescribed by the Secretary, the exempt foreign trade income of a FSC for any taxable year shall be limited under rules similar to the rules of clauses (ii) and (iii) of section 995(b)(1)(F).

(3) Exchange of information requirements. — For purposes of this title, the term "FSC" shall not include any corporation which was created or organized under the laws of any foreign country unless there is in effect between such country and the United States —

(A) a bilateral or multilateral agreement described in section 274(h)(6)(C) (determined by treating any reference to a beneficiary country as being a reference to any foreign country and by applying such section without regard to clause (ii) thereof), or

(B) an income tax treaty which contains an exchange of information program —

(i) which the Secretary certifies (and has not revoked such certification) is satisfactory in practice for purposes of this title, and

(ii) to which the FSC is subject.

(4) Disallowance of treaty benefits. — Any corporation electing to be treated as a FSC under subsection (f)(1) may not claim any benefits under any income tax treaty between the United States and any foreign country.

(5) Coordination with possessions taxation. —

(A) Exemption. — No tax shall be imposed by any possession of the United States on any foreign trade income derived before January 1, 1987. The preceding sentence shall not apply to any income attributable to the sale of property or the performance of services for ultimate use, consumption, or disposition within the possession.

(B) Clarification that possession may exempt certain income from tax. — Nothing in any provision of law shall be construed as prohibiting any possession

of the United States from exempting from tax any foreign trade income of a FSC or any other income of a FSC described in paragraph (2) or (3) of section 921(d).

(C) No cover over of taxes imposed on FSC. — Nothing in any provision of law shall be construed as requiring any tax imposed by this title on a FSC to be covered over (or otherwise transferred) to any possession of the United States.

(f) Election of Status as FSC (and as small FSC). —

(1) Election. —

(A) Time for making. — An election by a corporation under section 922(a)(2) to be treated as a FSC, and an election under section 922(b)(1) to be a small FSC, shall be made by such corporation for a taxable year at any time during the 90-day period immediately preceding the beginning of the taxable year, except that the Secretary may give his consent to the making of an election at such other times as he may designate.

(B) Manner of election. — An election under subparagraph (A) shall be made in such manner as the Secretary shall prescribe and shall be valid only if all persons who are shareholders in such corporation on the first day of the first taxable year for which such election is effective consent to such election.

(2) Effect of election. — If a corporation makes an election under paragraph (1), then the provisions of this

subpart shall apply to such corporation for the taxable year of the corporation for which made and for all succeeding taxable years.

(3) Termination of election. —

(A) Revocation. — An election under this subsection made by any corporation may be terminated by revocation of such election for any taxable year of the corporation after the first taxable year of the corporation for which the election is effective. A termination under this paragraph shall be effective with respect to such election—

(i) for the taxable year in which made, if made at any time during the first 90 days of such taxable year, or

(ii) for the taxable year following the taxable year in which made, if made after the close of such 90 days, and

for all succeeding taxable years of the corporation. Such termination shall be made in such manner as the Secretary shall prescribe by regulations.

(B) Continued failure to be a FSC. — If a corporation is not a FSC for each of any 5 consecutive taxable years of the corporation for which an election under this subsection is effective, the election to be a FSC shall be terminated and not be in effect for any taxable year of the corporation after such 5th year.

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(g) Treatment of shared FSC's. —

(1) In general. — Except as provided in paragraph (2), each separate account referred to in paragraph (3) maintained by a shared FSC shall be treated as a separate corporation for purpose of this subpart.

(2) Certain requirements applied at shared FSC level. — Paragraph (1) shall not apply —

(A) for purposes of —

(i) subparagraphs (A), (B), (D), and (E) of section 922(a)(1),

(ii) paragraph (2) of section 922(a),

(iii) subsections (b), (c), and (e) of section 924, and

(iv) subsection (f) of this section, and

(B) for such other purposes as the Secretary may by regulations prescribe.

(3) Shared FSC. — for purposes of this subsection, the term "shared FSC" means any corporation if —

(A) such corporation maintains a separate account for transactions with each shareholder (and persons related to such shareholder),

(B) distributions to each shareholder are based on the amounts in the separate account maintained with respect to such shareholder, and

(C) such corporation meets such other requirements as the Secretary may by regulations prescribe.

(Added Pub.L. 98-369, Title VIII, § 801(a), July 18, 1984, 98 Stat. 991, and amended Pub.L. 99-514, Title XVIII, § 1876(a)(1), (e)(1), (f)(1), (p)(5), Oct. 22, 1986, 100 stat. 2897, 2899, 2902; Pub.L. 100-647, Title I, § 1012(bb)(8)(A), Nov. 10, 1988, 102 Stat. 3536; Pub.L. 101-508, Title XI, § 11704(a)(10), Nov. 5, 1990, 104 Stat. 1388-518; Pub.L. 103-66, Title XIII, § 13239(a), Aug. 10, 1993, 107 Stat. 509.)

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19 U.S.C. § 2702

§ 2702. Beneficiary country

(a) Definitions; termination of designation

(1) for purposes of this chapter—

(A) The term "beneficiary country" means any country listed in subsection (b) of this section with respect to which there is in effect a proclamation by the President designating such country as a beneficiary country for purposes of this chapter. Before the President designates any country as a beneficiary country for purposes of this chapter, he shall notify the House of Representatives and the Senate of his intention to make such designation, together with the considerations entering into such decision.

(B) The term "entered" means entered, or withdrawn from warehouse for consumption, in the customs territory of the United States.

(C) The term "HTS" means Harmonized Tariff Schedule of the United States (19 U.S.C. 1202).

(2) If the President has designated any country as a beneficiary country for purposes of this chapter, he shall not terminate such designation (either by issuing a proclamation for that purpose or by issuing a proclamation which has the effect of terminating such designation) unless, at least sixty days before such termination, he has notified the House of Representatives and the Senate and has notified such country of his intention to terminate such designation, together with the considerations entering into such decision.

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(b) Countries eligible for designation as beneficiary countries; conditions

In designating countries as "beneficiary countries" under this chapter the President shall consider only the following countries and territories or successor political entities:

Anguilla
Antigua and Barbuda
Bahamas, The
Barbados
Belize
Costa Rica
Dominica
Dominican Republic
El Salvador
Grenada
Guatemala
Guyana
Haiti
Honduras
Jamaica
Nicaragua
Panama
Saint Lucia
Saint Vincent and the Grenadines
Surinam
Trinidad and Tobago
Cayman Islands
Montserrat
Netherlands Antilles
Saint Christopher-Nevis
Turks and Caicos Islands
Virgin Islands, British

In addition, the President shall not designate any country a beneficiary country under this chapter —

(1) if such country is a Communist country;

(2) if such country —

(A) has nationalized, expropriated or otherwise seized ownership or control of property owned by a United States citizen or by a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens,

(B) has taken steps to repudiate or nullify —

(i) any existing contract or agreement with, or

(ii) any patent, trademark, or other intellectual property of,

a United States citizen or a corporation, partnership, or association which is 50 per centum or more beneficially owned by United States citizens, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of property so owned, or

(C) has imposed or enforced taxes or other exactions, restrictive maintenance or operational conditions, or other measures with respect to property so owned, the effect of which is to nationalize, expropriate, or otherwise seize ownership or control of such property, unless the President determines that —

(i) prompt, adequate, and effective compensation has been or is being made to such citizen, corporation, partnership, or association,

(ii) good-faith negotiations to provide prompt, adequate, and effective compensation under the applicable provisions of international law are in progress, or such country is otherwise taking steps to discharge its obligations under international law with respect to such citizen, corporation, partnership, or association, or

(iii) a dispute involving such citizen, corporation, partnership, or association, over compensation for such a seizure has been submitted to arbitration under the provisions of the Convention for the Settlement of Investment Disputes, or in another mutually agreed upon forum, and

promptly furnishes a copy of such determination to the Senate and House of Representatives;

(3) if such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership or association which is 50 per centum or more beneficially owned by United States citizens which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute;

(4) if such country affords preferential treatment to the products of a developed country, other than the United States, which has, or is likely to have, a significant adverse effect on United States commerce, unless the President has received assurances satisfactory to him that such preferential treatment will be eliminated or that action will be taken to assure that there will be no such significant adverse effect, and he reports those assurances to the Congress;

(5) if a government-owned entity in such country engages in the broadcast of copyrighted material, including films or television material, belonging to

United States copyright owners without their express consent;

(6) unless such country is a signatory to a treaty, convention, protocol, or other agreement regarding the extradition of United States citizens; and

(7) if such country has not or is not taking steps to afford internationally recognized worker rights (as defined in section 2462(a)(4) of this title) to workers in the country (including any designated zone in that country).

Paragraphs (1), (2), (3), (5), and (7) shall not prevent the designation of any country as a beneficiary country under this chapter if the President determines that such designation will be in the national economic or security interest of the United States and reports such determination to the Congress with his reasons therefor.

(c) Factors determining designation

In determining whether to designate any country a beneficiary country under this chapter, the President shall take into account —

(1) an expression by such country of its desire to be so designated;

(2) the economic conditions in such country, the living standards of its inhabitants, and any other economic factors which he deems appropriate;

(3) the extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country;

(4) the degree to which such country follows the accepted rules of international trade provided for under the WTO Agreement and the multilateral trade agreements (as such terms are defined in paragraphs (9) and (4), respectively, of section 3501 of this title);

(5) the degree to which such country uses export subsidies or imposes export performance requirements or local content requirements which distort international trade;

(6) the degree to which the trade policies of such country as they relate to other beneficiary countries are contributing to the revitalization of the region;

(7) the degree to which such country is under taking self-help measures to promote its own economic development;

(8) whether or not such country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights.

(9) the extent to which such country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property, including patent, trademark, and copyright rights;

(10) the extent to which such country prohibits its national from engaging in the broadcast of copyrighted material, including films or television material, belonging to the United States copyright owners without their express consent; and

(11) the extent to which such country is prepared to cooperate with the United Sates in the administration of the provisions of this chapter.

(d) Amendment of Tariff Schedules General Headnote

[Subsec. (d) amended General Headnote 3(a) of the Tariff Schedules. The General Headnotes and Rules of Interpretation of the Tariff Schedules are no longer carried in the United States Code Annotated. See notice under section 1202 of this title.]

(e) Withdrawal or suspension of duty-free treatment to specific articles

(1) The President may, after the requirements of subsection (a)(2) of this section and paragraph (2) have been met —

(A) withdraw or suspend the designation of any country as a beneficiary country, or

(B) withdraw, suspend, or limit the application of duty-free treatment under this chapter to any article of any country,

if, after such designation, the President determines that as a result of changed circumstances such country would be barred from designation as a beneficiary country under subsection (b) of this section.

(2)(A) The President shall publish in the Federal Register notice of the action the President proposes to take under paragraph (1) at least 30 days prior to taking such action.

(B) The United States Trade Representative shall, within the 30-day period beginning on the date on which the President publishes under subparagraph (A) notice of proposed action —

(i) accept written comments from the public regarding such proposed action,

(ii) hold a public hearing on such proposed action, and

(iii) publish in the Federal Register —

(I) notice of the time and place of such hearing prior to the hearing, and

(II) the time and place at which such written comments will be accepted.

(f) Reporting requirements

On or before October 1, 1993, and the close of each 3-year period thereafter, the President shall submit to the Congress a complete report regarding the operation of this chapter, including the results of a general review of beneficiary countries based on the considerations described in subsections (b) and (c) of this section.

(Pub.L. 98-67, Title II, § 212(a)-(c), (e), Aug. 5, 1983, 97 Stat. 384; Pub.L. 99-570, Title IX, § 9002(b), Oct. 27, 1986, 100 Stat.

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3207-166; Pub.L. 100-418, Title I, §§ 1214(q)(1), 1909(c), Aug. 23, 1988, 102 Stat. 1159, 1318; Pub.L. 101-382, Title II, §§ 213, 214, Aug. 20, 1990, 104 Stat. 656; Pub.L. 108-465, Title VI, § 621(a)(2), Dec. 8, 1994, 108 Stat. 4992.)